TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 282

ALMA SCHULZ, ADMINISTRATRIX OF THE ESTATE OF AUGUST M. SCHULZ, PETITIONER,

vs.

THE PENNSYLVANIA RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 1, 1955

CERTIORARI GRANTED NOVEMBER 7, 1955

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

ALMA SCHULZ, Administratrix of the Estate of August M. Schulz, Jr., Deceased, Plaintiff,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, Defendant

COMPLAINT—PLAINTIFF DEMANDS JURY TRIAL

Filed June 27, 1950

Plaintiff, complaining of the above-named defendant, respectfully alleges:

First: Plaintiff, Alma Schulz, administratrix of the estate of August M. Schulz, Jr., deceased, is a resident of the City of East Rutherford, in the County of Bergen and State of New Jersey, and is a citizen of the State of New Jersey and of the United States of America.

Second: The plaintiff, Alma Schulz, was appointed administratrix of the estate of August M. Schulz, Jr., deceased, by Donald G. Dutcher, Surrogate of the County of Bergen, State of New Jersey, on the 6th day of March, 1950.

Third: The defendant, The Pennsylvania Railroad Company, was and still is a corporation of the Commonwealth of Pennsylvania, doing business in the State of New York and having an office and place of business in the Borough of Manhattan, City and State of New York.

Forth: This action is brought pursuant to Section 33 of the Merchant Marine Act of 1920, 46 U.S. Code 688, (known as the Jones Act), and plaintiff hereby elects to maintain this action for damages at law, with the right of trial by jury, and to take the benefit of all statutes of the United States modifying or extending the common-law [fol. 2] right or remedy in cases of personal injury to railway employees, in accordance with the provisions of said Act.

Fifth: At all times hereinafter mentioned, the defendant, The Pennsylvania Railroad Company, owned, operated,

managed and controlled a certain tug boat known as the "Altoona", engaged in interstate commerce and coast wise and foreign trade.

Sixth: At all times hereinafter mentioned, the deceased, August M. Schulz, Jr., was in the employ of the defendant, The Pennsylvania Railroad Company, as a fireman on the said tug boat, "Altoona", and was a seaman on said boat.

Seventh: On December 25, 1949, the tug boat, "Altoona" was docked or moored at Pier H, Jersey City, Hudson County, State of New Jersey, a pier owned, operated, managed and controlled by the defendant, The Pennsylvania Railroad Company.

Eighth: On December 25, 1949, while the deceased, August M. Schulz, Jr., was employed as a seaman on board the tug boat, "Altoona", which was moored to the dock of the defendant, Pier H, Jersey City, New Jersey, and while in the course of his duties and in the performance of his work as a seaman on board the said tug boat, as a result of the negligence and carelessness of the defendant, its agents, servants or employees, the deceased, August M. Schulz, Jr., was caused to fall into the water resulting in his death by accidental drowning.

Ninth: Said accident was caused without any fault on the part of the deceased, August M. Schulz, Jr., wholly and solely by the defective, unsafe and unseaworthy condition of the tug boat and by the negligence of the defendant, by [fol. 3] its agents, servants or employees as follows:

(1) In failing to furnish and provide the deceased with a safe place to perform his work.

(2) In failing to furnish and provide the deceased with a safe means of ingress and egress from the tug to the dock.

(3) In failing to furnish and provide the deceased with a safe means of ingress and egress from one tug boat to another.

(4) In that the dock and tug boats were unlighted or improperly or insufficiently lighted.

(5) In negligently navigating, maneuvering, moving or mooring the barges and tugs of the defendant.

(6) In that the tug boats of the defendant were defective, unsafe and unseaworthy.

(7) In that the dock was defective and unsafe.

(8) In failing to make proper inspection of the dock and tug boat.

(9) In failing to warn the deceased of the dangerous and unsafe condition of the dock and tug boat.

(10) In failing to maintain a watchman, guard or lookout.

(11) In failing to provide ropes, chains or other protection about the defective portions of the dock and tug boat.

(12) In failing to provide proper gangways from one tug boat to another, and to the dock.

(13) In failing to provide proper lighting facilities from one tug boat to another and to the dock.

Tenth: The deceased, August M. Schulz Jr., left surviving him, Alma Schulz and two children, Judith, age 10 and Cynthia, age 3, who sustained pecuniary loss as a result of the death of August M. Schulz Jr., this action being commenced by the personal representative for the benefit of the said widow and children of the deceased.

[fol. 4] Eleventh: This action is commenced within two years after the happening of the accident and the death of August M. Schulz, Jr. deceased.

Twelfth: That by reason of the premises the estate of the deceased, August M. Schulz Jr., and the surviving widow and children of the deceased, August M. Schulz, Jr., have been damaged in the sum of Two hundred thousand ($200,000.) dollars.

Wherefore, plaintiff, Alma Schulz, administratrix of the estate of August M. Schulz Jr., demands judgment against the defendant in the sum of Two hundred thousand ($200,000.) dollars, together with the costs and disbursements of this action.

Nathan Baker, Attorney for plaintiff, Office & P. O. Address: 1 Newark Street, Hoboken, N. J., and 401 Broadway (Room 2201), New York City.

To the Defendant:

Take Notice that the plaintiff demands trial by jury.

Nathan Baker, Attorney for plaintiff.

[fol. 5] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ANSWER—Filed July 15, 1950

The defendant answering the complaint herein:

I. Denies that it has any knowledge or information sufficient to form a belief thereof as to each and every allegation contained in paragraphs numbered "First", "Second" and "Tenth" of the complaint.

II. Admits the allegations contained in paragraphs numbered "Third", "Seventh" and "Eleventh" of the complaint.

III. Upon information and belief, denies each and every allegation contained in paragraphs numbered "Fourth", "Sixth", "Eighth", "Ninth"—(1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12) and (13) and "Twelfth" of the complaint.

IV. Admits that, at the times mentioned in the complaint, the defendant, The Pennsylvania Railroad Company, owned, operated, managed and controlled a certain tug boat known as the "Altoona", but except as so admitted, denies each and every allegation contained in paragraph numbered "Fifth" of the complaint.

[fol. 6] V. Except as hereinbefore admitted or otherwise controverted, denies each and every allegation contained in the complaint.

The Defendant Further Answering and for a First, Separate and Complete Defense to the Cause of Action, if any, Alleged in the Complaint, Alleges:

VI. That if plaintiff's intestate was caused to fall into the water resulting in his death by accidental drowning, as is alleged in the complaint, he assumed the risk of his employment, and that at said time the defendant, its officers, agents and or employees were not negligent and the defendant did not violate any Statute or Statutes enacted for the safety of its employees.

The Defendant Further Answering and for a Second, Separate and Complete Defense to the Cause of Action, if any, Alleged in the Complaint, Alleges:

VII. That if plaintiff's intestate was caused to fall into the water resulting in his death by accidental drowning, as is alleged in the complaint, his death resulted from his own negligence and without any fault or negligence on the part of the defendant, its agents, servants or employees, and the defendant did not violate any Statute or Statutes enacted for the safety of its employees.

The Defendant Further Answering and for a Third, Separate and Partial Defense to the Cause of Action, if any, Alleged in the Complaint, Alleges:

VIII. That if plaintiff's intestate was caused to fall into the water resulting in his death by accidental drowning, as is alleged in the complaint, his own negligence contributed [fol. 7] to his death, and the defendant did not violate any Statute or Statutes enacted for the safety of its employees.

The Defendant Further Answering and for a Fourth, Separate and Complete Defense to the Cause of Action, if any, Alleged in the Complaint, Alleges:

IX. That at the times mentioned in the complaint, the plaintiff's intestate was employed by the defendant, The Pennsylvania Railroad Company, as a watch fireman assigned to four tug boats laid up at Pier H, Jersey City, New Jersey, and that the accidental drowning, if it occurred in the manner alleged in the complaint, occurred while plaintiff's intestate was so employed; that at the said time there was in full force and effect an act of the Congress of the United States known as the Longshoremen's and Harbor Workers' Compensation Act, 1927, and subsequent amendments thereto; that at the said time the defendant had, and thereafter has, fully complied with the requirements of said Act; that at the said time plaintiff's intestate and the defendant were within the provisions of this Act; that the said Act provides the exclusive remedy, if any, for the plaintiff herein; that by reason of these premises plaintiff is not entitled to any recovery in this action.

Wherefore, the defendant asks that the complaint herein be dismissed with costs.

Dated: New York, N. Y., July 14, 1950.

Conboy, Hewitt, O'Brien & Boardman, By Members of Firm, Attorneys for Defendant, 39 Broadway, New York 6, N. Y.

[fols. 8-9] DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE TO TAKE DEPOSITIONS.

Sir:

Please take notice that pursuant to the Rules of Federal Practice the defendant will take the deposition of the plaintiff, Alma Schulz, upon oral examination for the purpose of discovery and for use as evidence in the above action or for both purposes before Gertrude K. Coolidge, a Notary Public of the State of New York, at the office of Conboy, Hewitt, O'Brien & Boardman, 39 Broadway, Borough of Manhatton, City and State of New York, at 10:30 A.M. on September 13, 1950, or before some other officer authorized to take depositions, on all matters, not privileged, which are relevant and material to the issues and the subject matter involved in the pending action, and that the said plaintiff is required to appear at the aforesaid time before said Notary Public, Gertrude K. Coolidge, at the above address, and submit to such examination before said Notary Public.

Dated, New York, N. Y., July 14, 1950

Yours, etc., Conboy, Hewitt, O'Brien & Boardman, By , Member of Firm, Attorneys for Defendant, 39 Broadway, New York 6, N. Y.

To: Nathan Baker, Esq., Attorney for Plaintiff, 401 Broadway, Room 2201, New York City.

[fol. 10] In United States Court of Appeals for the Second Circuit

Appendix to Appellant's Brief

Docket Entries

June 27, '50. Filed complaint and issued summons.
June 30, '50. Filed Summons and Ret. Served H. H. Pen-ler for deft. 6-28-50.
July 15, '50. Filed Answer and Notice to take plaintiff's deposition.
Oct. 29, '54. Filed affidavit for adjournment.
Nov. 10, '54. Before Edelstein, J.—Trial begun.
Nov. 12, '54. Trial cont'd.
Nov. 16, '54. Trial cont'd.
Nov. 17, '54. Trial cont'd.
Nov. 18, '54. Trial cont'd.
Nov. 19, '54. Trial cont'd. and concluded—Verdict for the deft. upon motion.
Nov. 19, '54. Trial Judgment for deft. v. pltff.—Clerk mailed notice of entry 11-22-54.
Dec. 3, '54. Trial pltff.'s notice of appeal (Mailed copy to Conboy AO & B 12-6-54).
Dec. 22, '54. Trial transcript of record of proceedings of Nov. 10, 12, 16, 17, 18, 19, 1954.
Jan. 11, '55. Certified record on appeal to U. S. C. A.

[fol. 11] In United States District Court, Southern District of New York

Excerpts from Stenographer's Minutes.

Mr. Baker: At this time, your Honor, I move to strike out the fourth separate defense in the answer filed by the defendant Pennsylvania Railroad on the ground it is not a proper defense. The defendant cannot set up as a defense to this action under the Jones Act that there is another action under the Longshoremen and Harbor Workers' Compensation Act. One act is completely exclusive of the other.
The defense of the defendant is that the deceased was not

a seaman and not a member of the crew, so as not to entitle the plaintiff to sue under the Jones Act. They cannot set up affirmatively the Longshoremen and Harbor Workers' Compensation Act as a defense to this action under the Jones Act. And the setting up of such a defense in the answer and the mentioning of such a defense to the jury would be prejudicial to the plaintiff's case.

The Court: Motion denied.

. . . . . .

Mr. Allen: There is no claim in the defense that the decedent committed suicide or that he was anything but an honorable man. I think it has no part in the case.

The Court: Is there a further concession there was no foul play?

Mr. Allen: Yes.

Mr. Baker: We didn't know that. Now we know it.

The Court: It is known now beyond dispute, so we can proceed from there.

Mr. Baker: It is now admitted that he met his death by accident.

. . . . . .

[fol. 12] ALMA SCHULZ, Direct.

. . . . . .

Mr. Allen: There has never been any indication on the part of the railroad on any shape or form that the decedent committed suicide or was the victim of foul play or there was anything dishonorable in his background.

. . . . . .

The Court: It was stipulated that this man did not commit suicide and there was no foul play?

Mr. Allen: That's right.

. . . . . .

Q. What was the last time you saw your husband alive, when was that?

A. Christmas Day, in the afternoon, just before he left for work.

Q. What time was that, about?
A. About 2:30.
Q. At 2:30 in the afternoon?
A. Yes.
Q. What time was he due for work as far as you know?
A. I understood about 5:00 o'clock.
Q. His hours that day, if you know?
A. I wouldn't know.
Q. When he left the house, did he take anything with him?
A. Just his lunch.
Q. Was that packed?
A. No; in a paper bag.

. . . . . .

JAMES H. CORCORAN, Direct.

. . . . . .

Q. Were you employed by The Pennsylvania Railroad as a crew dispatcher on December 25, 1949?
A. I was.
[fol. 13] Q. On Christmas Day, 1949, what were your hours as crew dispatcher?
A. 3:00 p. m. to 11:00 p. m.
Q. Where was your office located?
A. On the outer end of Pier H, toward the water.
Q. Is that Jersey City?
A. Yes, sir.

. . . . . .

Q. On this particular day, December 25, 1949, did you assign August Schulz to any work that day or dispatch him to any work?
A. I did.
Q. What did you assign him to?
A. I assigned him to watch a certain amount of tugboats, and it seems to me the number now is four. I am not sure of that. If it was four, it was three steamboats and one diesel.

. . . . . .

Q. What time was his regular time to start work that day?

A. He was due to start work that day at 5:00 o'clock.

Q. Could you explain to this Court and jury in your own way anything that may have happened with reference to August Schulz that caused him to come late from your observation or from your conversations?

A. He called me and told me he had missed the bus connection or train connection. He told me he was going to be late.

Q. When was that he called you?

A. It must have been about 4:00 o'clock, as far as I can recall.

Q. You knew, then, he would be late?

A. He told me he would be late. He wanted to know if he should continue coming to work.

Q. What did you tell him?

A. I told him to continue to come in to work.

[fol. 14] Q. Did you say anything about being short a fireman, that you wanted him to come in?

A. I told him if he didn't come in we would be short a fireman, yes.

Q. Therefore, he did continue and came in at 5:15?

A. About 5:15, yes.

Q. What did you do with reference to the work that he was supposed to do on these various tugs? Did you assign anyone else until he arrived?

A. Excuse me. I had a little layout made for whatever men I had for that day to watch boats, including Mr. Schulz. When he called me and said he would be late, I called Mr. Barker, who was another watch fireman that day, and asked him just to check these boats; in other words, to see the water was all right and the fires were okay,—he didn't have to do any work on them—until such time as Mr. Schulz arrived. He did do that.

Q. What time was it that he went to check these tugboats?

A. Right after I received a call.

Q. What time did Mr. Barker complete his regular work?

A. He hadn't completed his regular work; he was working from 3:00 to 11:00.

Q. How many boats did you tell him to check until Schulz came?

A. How many I had lined up for Schulz.

Q. You don't recall now how many?

A. Four boats.

Q. You told Barker to check those tugboats until Mr. Schulz came?

A. That's right.

Q. When did Mr. Barker come back?

A. About the same time as Mr. Schulz, I believe they came together.

Q. What did Mr. Schulz do or say to you at 5:15 with reference to what he had to do?

A. He didn't say anything. I gave him a sheet and he knew what that meant, that he has those boats. But I did say to him that Mr. Barker told me that he had checked them.

[fol. 14a] Mr. Schulz went out to double check the boats. He went out in his street clothing.

Q. He went in his street clothes on these boats?

A. Yes.

. . . . . .

Q. Did August Schulz, after he left you in his street clothes to go aboard the boats, return?

A. Yes.

Q. What time did he return?

A. I would say it was about 7:00 o'clock, or possibly a little after.

Q. 7:00 p. m.?

A. Yes.

Q. Was he still dressed in his street clothes?

A. He was.

Q. Did he say anything to you as to where he was going then?

A. He said that he had just completed rechecking the boats and he was going in to change his clothes and go to work.

Q. What did you see him do after that, after you talked with him about 7:00 or 7:15?

A. He left the office.

Q. Did you see the direction?

A. He walked in a direction—the direction would be east, going inshore.

Q. Would that be going toward the Altoona?

A. The Altoona was up the dock.

Q. Was that the direction he was going?

A. Yes. The other direction is the river.

Q. We want to get this on the record: He left you walking in the direction of the tug Altoona, where it was docked at the pier?

A. Yes.

Q. Is that the last that you saw him?

A. Yes.

Q. And your job was until 11:00 o'clock that night, would you say?

A. Yes.

[fol. 14b] Q. Was Mr. Schulz' hours up to 11:00, or after 11:00?

A. Until 1:00.

Q. 1:00 in the morning?

A. Yes, sir.

Q. During the course of the work that they do as firemen on these tugs, which are there overnight, do they come back in the course of their work with any papers or any reports or checkups?

A. No, sir.

Q. What do they usually do? What is the customary thing that they do?

A. I don't understand.

Q. Do they come back during the course of their work for any reason at all to the dispatcher's office?

A. If there is something wrong, for instance, if they find the boat didn't have enough water, they wouldn't speak to me but ask me to get in touch with whoever was in charge.

Q. During duty would they bring in any report?

A. A watch fireman's report.

Q. And that report is turned in to whom?

A. The crew dispatcher who is on duty.

Q. So that as far as Schulz is concerned, he wouldn't turn that in until he finishes his work, 1:00 o'clock in the morning?

A. Yes.

Q. And you wouldn't be on duty?

A. No.

Q. Who would be on duty?

A. I believe Mr. Breuhaus.

Q. So that up to the time that you finished your work as dispatcher at 11:00 o'clock that night, did you know anything about Mr. Schulz being missing or anything like that?

A. No.

Q. Was Schulz an extra man?

A. Yes.

Q. As an extra man, would he work sometimes on the vessels which went out and sometimes on the vessels which stayed overnight?

[fol. 15] Q. In any event, on these vessels that go out from the pier in the course of the work that they are to do, was he a fireman on those vessels?

A. Yes.

Q. So that sometimes he would be assigned to a vessel which is going out and sometimes he is assigned to a vessel or tugboat or more than one tugboat which is staying at the dock; is that right?

A. Yes.

Q. As an extra fireman, would he be dispatched to whichever tug or tugs may be open at the time that needed a fireman?

A. Yes.

Q. It doesn't necessarily have to be the same tug or tugs each time he goes to work?

A. Yes.

Q. It varies all the time?

A. Yes.

Q. During the period of time these four tugs were tied up that night, were any lights kept aboard these tugs?

A. No, sir.

Q. They were in complete darkness?

A. There were no lights on the boats.

. . . . . .

Q. On December 25, 1949, was there only one person assigned, namely, a fireman to work on these four boats, these four tugs?

A. Yes.

Q. So that August Schulz was the only one, as a fireman, assigned to those boats during the time you mentioned?

A. Yes.

[fol. 16] Q. No other person?

A. Except for the time when Mr. Barker looked at them. But after Mr. Schulz took them, he had them.

Q. While he had them he was the only one assigned to those four tugboats?

A. Yes.

Q. Did the firemen who were assigned that way—were they required to have a searchlight?

A. I don't know if they were required, but for their own benefit they always do have.

Q. Did they, in the performance of this work, use a flashlight?

A. Yes.

Q. Was that because it was dark on these boats, so that they could get about?

A. Yes.

. . . . . .

Q. What was the purpose of his having the flashlight?

. . . . . .

A. To be able to see better and check the water on the boats better.

Q. In order to get from one boat to another, where he has a tier of boats to take care of?

A. Yes, I guess so.

. . . . . .

JAMES H. CONCORAN, Redirect.

Q. Here is the log for the Altoona. Will you take a look at the Altoona log and tell us, by looking at this log, when, before December 25, 1949, the Altoona was tied up at this pier?

A. The last log entry here is from 11:59 p. m., December 23 to 7:59 a. m. of December 24. There is nothing for the 25th, which signifies that the boat wasn't working.

[fol. 17] Q. So that the vessel, the Altoona, was tied up, from 7:59 a. m., December 24, and then it started operating again 7:59 a. m., December 26, two days later?

A. That's right.

Q. Looking at this long entry of the Princeton, what does that indicate as to when it arrived on or before December 25, 1949, when it arrived at that pier?

A. 11:00 p. m., December 23, to 7:00 a. m., December 24.

Q. So that in accordance with the next log entry, this Tug Princeton left to do its work at 7:00 a. m., December 26, 1949?

A. That's right.

Q. Will you tell us whether the Fort Wayne was the third vessel that was tied up abreast?

A. It was tied up.

Q. According to the log entries of the Fort Wayne of The Pennsylvania Railroad, would you tell us when it tied up at this pier on or before December 25, 1949?

A. 11:00 p. m., December 23, 1949, to 7:00 a. m., December 24, 1949.

Q. Was the fourth boat that was tied up the Williamsport?

A. Yes.

Q. Will you refer to these Pennsylvania Railroad records of the Williamsport when it was tied up to this pier [fol. 18] with reference to December 25, 1949.

A. 7:59 p. m., to 8:00 a. m., December 24, 1949, the boat tied up.

. . . . . .

A. It was scheduled to go to work 3:59 p. m., December 26, 1949, and the log shows the boat went to work 5:00 p. m. on that date.

Q. Of December 26th?

A. Yes, sir.

. . . . . .

Q. Were these boats tied up at the time for the temporary purpose, the intention being they would again be used in navigation?

A. Yes.

. . . . . .

Q. When Mr. Schulz came to work, I think you saw him on two occasions that day?

A. Yes.

Q. On both occasions, at all times when you saw him, on December 25, 1949, was he sober?

A. Yes.

Q. Was he in a fit condition to do his work?

A. Yes.

The Court: The concession is on the record now that there is no claim that he was under the influence of alcohol.

. . . . . .

Q. How about working on boats which are tied up and crossing from one boat to another, is it a disadvantage?

A. Working on boats that are tied up——

Mr. Allen: We have no testimony that Mr. Schulz was crossing from one boat to another.

[fol. 19] The Court: Objection sustained.

Q. In fact, it would be safer, would it not, that he use a flashlight in crossing from one boat to another?

Mr. Allen: I am certainly going to object to that.
The Court: Sustained.

Q. Could I refresh your recollection with a deposition which was taken on March 22, 1951, and ask you to look at this question and answer on page 46 and then let us know whether that refreshes your recollection.

Mr. Allen: It is directed to the question to which my objection was just sustained.
The Court: Ask him was he asked that question and did he give that answer.

Q. Were you asked this question on page 46 of this deposition:

"Q. In order to get from one tug to another in accordance with the conditions present on these tugs on December 25, 1949, it would be proper for the fireman to use a flashlight?"

The Court: Objection sustained. There has been no testimony that he crossed from one tug to another.
Mr. Baker: We are proceeding on circumstantial evidence.
The Court: I don't want any further colloquy.

[fol. 20] By Mr. Baker:

Q. Was this question asked:

"Q. But you say it would be safer to use a flashlight?"
Mr. Allen: Same objection.
The Court: Sustained.

Q. On page 40 of your deposition, were you asked this question:

"Q. Would you say they were dark so you had to use a flashlight or lantern in going about aboard these tugs?"

And your answer——

Mr. Allen: I have an objection before the answer. There is no testimony here that the plaintiff was going about these tugs.

Mr. Baker: He certainly was doing something. He had his clothes there. It is the inference for the jury——

Mr. Allen: It is not a picayune objection. I would like a ruling on it.

The Court: I will allow it.

. . . . . .

[fol. 21] Q. "Would you say they were dark that you had to use a flashlight or lantern in going about aboard these tugs?"

Mr. Allen: I object to the form of the question.

The Court: Sustained.

. . . . . .

Q. I will ask you this question: Would you say it was dark so that you had to use a flashlight in going about aboard those tugs on this particular occasion?

Mr. Allen: I object to the form of the question.

The Court: Sustained.

. . . . . .

FREDERICK A. STETSON, Direct.

Q. What were you at that time?

A. Assistant foreman of engines.

. . . . . .

Q. What were your duties as assistant foreman on December 25, 1949?

A. My duties are the maintenance of the boats, see that they are taken care of properly and all concerning the engine room, and even when the men go out on them and when they are tied up; I check on everything.

. . . . . .

Q. When you say you checked them, what do you have to do?

A. When I check on a man that is watching a boat, I usually go aboard the boat to see whether he is on a boat or [fol. 22] see that he takes care of the boiler properly, see that the fires are there, the amount of steam he has to carry, and free of bilges and there is water in the tank.

Q. What you just mentioned, is that the fireman's duty?

A. That is the fireman's duty.

Q. Was that Schulz' duty that night?

A. Yes.

* * * * * * *

The Court: Let me ask you this question: If the fires had been permitted to go down, if you know—I don't want any answer from you unless you know the answer and you know it out of your competency—if these fires had been permitted to die down entirely, if nobody had been tending them at all, could these vessels go out?

The Witness: No, sir.

* * * * * * *

A. When I got in to the third tier, I went aboard the Tug Altoona, which is alongside the dock.

Q. Tell us what you found.

A. The first thing I do is look to see there is the proper amount of water in the boiler. I looked at the fires. When I looked at those fires, I knew something was wrong, because they were practically out.

Q. That is the Altoona?

A. Yes.

Q. The one next to the pier?

A. Yes.

The Court: What time was this?

The Witness: This must have been about, I would say, 12:15. I had to go over the other six boats.

* * * * * * *

[fol. 23] Q. When you saw that these fires were neglected, did you then look in the water to see if there was anybody in the water?

A. I didn't have any idea there was anything wrong with somebody.

Q. What did you do when you got back to the office?

A. I went back to the office—I always did this—I went back to the office and I said to the crew dispatcher on the last trick, "Who was watching the boats in the third tier?"

He had a slip which showed that Schulz was the man who was watching, and when I said to him, "Where is the man?" he said he didn't know.

Q. Who was that crew dispatcher?

A. Ernest Brenhaus.

Q. Brenhaus?

A. Yes.

Q. What did you do then?

A. What he told me was that they didn't know where the man was or what happened to the man or anything else.

Q. Were you asked this question, on page 93:

"While you were stepping from one boat to the other that night, you were using this flashlight?

A. That is right"?

Q. Do you want to see it?

A. In some circumstances I have to use a light.

Q. "Q. While you were stepping from one boat to the [fol. 24] other that night, you were using this flashlight?

A. That is right."

Is it true you were using this flashlight or this railroad light while you were stepping from one boat to another that night?

A. In some cases, yes.

Q. I am talking about that night.

A. That night, in some cases I had to use it.

Q. Question, page 92:

"Were you using it when you were looking at the boats in this tier, with the Altoona?"

I will read back a little bit. Page 92:

"Q. Did you look with a flashlight?

A. We always have an electric railroad light.

"Q. Were you using it?"

A. Yes.

"Q. Were you using it when you were looking at the boats in this tier with the Altoona?

A. I have to use it, otherwise I wouldn't be able to see anything."

"Did you say that?

A. Inside the boat, yes, sir.

. . . . . .

Q. "Q. Do you use it when you are going from one boat to another boat?

A. That is right."

Is that inside the boat, when you are going from one boat to the other boat?

A. No, it is not. But in some cases you have to use it.

[fol. 25] Q. I asked you there and is that the truth, do you use it when you are going from one boat to another boat, and you answered, "That is right."

A. I used it sometimes. Certain times I have to use it.

Q. Did you use it that night?

A. Yes.

Q. Is it true you have to use it, otherwise you are not able to see anything?

A. Not outside, not all the time.

. . . . . .

Q. When you went aboard the vessel, did you look for anything concerning clothes that might have been left by someone on the vessel?

A. Not the first time, no.

Q. The second time, did you?

A. Yes, sir.

Q. What did you see?

A. I see clothes hanging on the bulkhead, street clothes.

Q. What vessel?

A. On the Altoona.

Q. You saw street clothes?

A. Yes.
Q. Hanging where?
A. On the bulkhead of the engine room.
Q. In the engine room?
A. Upper engine room.
Q. Is that where the firemen usually undress?
A. Yes.

. . . . . .

Q. Whose clothes were they, did you find out?
A. I found out later on that they belonged to Schulz.
Q. What time was it that you found these clothes?
A. That was the second time I went back on the boat. That was 25 after one.

. . . . . .

[fol. 26] Q. On page 103, did you testify, in this deposition of March 22, 1951:

"Q. The decks are washed down every night by the crews when they tie up?

A. Yes"?

A. Did I say that?

Q. Page 103.

A. I don't remember saying that.

Q. It says here:

"The decks are washed down every night by the crews when they tie up?"

And your answer is, "Yes."

A. I don't remember saying that.

Q. Was that the truth at that time?

A. They wouldn't wash them down in the wintertime, because they would have ice all over the thing. I wouldn't say that.

Q. "Q. How do they do that?

A. Everything is swept up and put away. We have a very strict safety program there."

Did you say that?

A. Swept up and put away, right.

Q. "Q. How are the decks washed down?

A. They are washed down with a regular hot water hose which comes from the boiler injector."

Did you say that?
A. That's right.
Q. Is that the truth?
A. They are washed down.
Q. Is that the truth?
A. That is the truth.
Q. Next question:
"Q. That is hot steam?
A. Yes.
"Q. That is done every night?
A. Practically every night."
Did you say that?
A. That is up to the captain.
[fol. 27] Q. Did you say that?
A. They are supposed to do it practically every night.
Q. Did you say that at that time, it was done practically every night?
A. No.
Q. You didn't say it?
A. Not every night.
Q. Practically every night?
A. I don't remember saying that at all.
Q. You don't remember?
A. No.
Q. After you testified, it was submitted to you to read and not only did you read it, but you signed it and you swore to it; isn't that so? Is that your signature?
A. Yes, it is.
Q. And did you swear to that on April 27, 1951?
A. I must have swore to it if I put my name down to it.
Q. You read this before you swore to it, did you not?
A. Not all of it.
Q. After you testified on March 22, 1951, and this was transcribed, then you read it, did you not, and swore to it on April 27, 1951, over a month later?
A. I put my name down to it. I don't know if I read all of it, though.
Q. Here it is. Would you say it was true that these decks were washed down practically every night?
A. Practically every night they are supposed to wash it down. Whether they did it that night or not, I don't know. That is a rule they have. It is supposed to be washed down.

Whether they washed them down that night, I don't know.

Q. Next question:

"Q. Was that done on the Altoona before it was tied down that night?

A. It must have been done, because the decks were clean."

A. I said that. They looked clean.

[fol. 28] Q. You say they must have washed it down when they brought it in and tied it down?

A. The decks looked clean to me when I looked at them.

Q. Then you were asked:

"Q. Do you know the condition of the weather that night?

A. Yes.

"Q. What was the condition of the weather?

A. Ten above zero."

* * * * * * * *

A. That is about what it was.

* * * * * * * *

Q. Would it be proper to wash down these decks when the temperature is 10 above zero?

A. No, it wouldn't.

Q. Why not?

A. For the simple reason you would have ice.

* * * * * * * *

Q. Did you see Mr. Schulz that night at all, December 25, any part of the time?

A. No, sir, I did not.

* * * * * * * *

FREDERICK A. STETSON, Cross.

* * * * * * * *

Q. Will you tell the Court and jury what the duties are of a fireman such as August Schulz was on December 25, 1949.

A. The duties of a watch fireman like that assigned to watch boats, he goes aboard the boats and the first thing he does is attend to the water in the boiler. If you don't

have water there, you will have a burned boiler. Then he goes downstairs and looks at the fires. If the fires need [fol. 29] tending, he tends to them. If the steam is low, he will raise the steam—75 to 100 pounds of steam. He can use the injector; he can use it to pump the water out of the bilges.

Then he checks on the tank to see it is full. Those are his duties. He can fix those fires up and the Scotch boiler, which is a three-fire Scotch; those fires can be fixed up where you don't have to touch them for two or three hours. That is the reason they gave them two or three boats to watch. If he has a boat next to him with a diesel, he would have to take more care of that boiler, because he was taking steam off there to keep the diesel warm. That would be his duties.

* * * * * * * *

FREDERICK A. STETSON, Redirect.

Q. What work the firemen do depends upon what the crew dispatcher gives them?

A. The crew dispatcher assigns the men, that is all he does.

Q. On one occasion, a relief fireman, as Schulz was, he may assign him to watch a boat which is tied up overnight, and on another occasion he may assign him on a boat to go out, isn't that so?

A. If the vacancy opens, he would put him on.

Q. It all depends on the opening, the work he would do?

A. That's right.

* * * * * * * *

Q. At that time it was freezing weather. You say it was about 10 above zero?

A. Yes.

Q. Is it not usual, when the temperature is that degree, that there is ice about the boat?

[fol. 30] Mr. Allen: Objection to the form of the question.

The Court: Sustained.

Q. Would you expect to have ice about the boat?

Mr. Allen: Same objection.
The Court: Sustained.

Q. Is it probable that there was ice about the boat?

Mr. Allen: Same objection.
The Court: Sustained.

Q. Is it quite dangerous in crossing; is it quite dangerous work on these tugs as a fireman, where you have to take care of two or three tugs, you have to cross from one tug to another?

Mr. Allen: Object to the question. There is still no testimony there was any crossing from one tug to another.

Mr. Baker: I have to go into it to get it.

The Court: If you want an opportunity to argue—

Mr. Baker: I don't want to argue it, your Honor.

The Court: I sustain the objection.

Q. You have testified in this deposition that you have to use this electric railroad light, otherwise you wouldn't be able to see anything.

Mr. Allen: I object to the form of the question.

[fol. 31] The Court: Sustained.

Q. Page 93:

"Q. Did you use it that night, December 25, 1949, when you were traveling from the Altoona to the other boats which were tied up alongside the Altoona?

A. That is right."

Were you asked that question and did you give that answer?

A. When I had to use it, I used the light.

Q. Was it the truth, what you said there?

A. It is.

Q. And on page 93:

"Q. While you were stepping from one boat to the other that night, you were using this flashlight?

A. That is right."

Was that question asked of you and was that your answer?

A. That is the same question and the same answer.

Q. And was that the truth?

A. Yes.

. . . . . .

FREDERICK A. STETSON, Recross.

. . . . . .

Q. Did Mr. Schulz have a flashlight on December 25, 1949?

A. I didn't see Mr. Schulz so I couldn't say whether he had a flashlight or not.

Q. Subsequently, did you find out that he had a flashlight

A. That is what I found out.

Q. How did you find it out?

A. They told me that when they found the body the flashlight was gripped in his hand.

[fol. 32] Now, I don't even know what hand it was in, but they said it was gripped in his hand.

. . . . . .

THOMAS L. BRENNAN, Direct.

Q. Are you connected with the Police Department of the City of Jersey City?

A. Yes, sir.

Q. Were you subpoenaed to bring some records concerning August Schulz?

A. Yes, sir.

Q. And do you have those records with you?

A. Yes, sir.

Q. Those are the official police records of the Police Department?

A. They are.

. . . . . .

A. Well, at 3:52 p.m. Marine Trucks and Sections 4, 5 and 6, in charge of Captain Foley in command, proceeded to Pier H, Pennsylvania Railroad, grappled without success

until 10:00 p.m. for a male missing from a Pennsylvania tug since 7:00 p.m., December 25th. The call came from the chief's office at 3:32 p.m.

Q. What is the next entry concerning Mr. Schulz?

A. Page 39. "At 8:30 a.m. on December 28, Marine Truck and Sections 8, 9 and 10, in charge of Captain Foley in command, proceeded to Pier H, Pennsylvania Railroad, at the foot of Pearl Street, grappled without success until 2:30 p.m. for male missing from Pennsylvania Railroad Tugboat Altoona. Returned at 3:00 p.m.

Q. What is your next entry?

A. The next entry we got is a teletype that was received [fol. 33] from the East Rutherford police reporting a missing person.

Q. And that came from the East Rutherford police?

A. That did.

Q. And whom did they report as missing?

A. August Schulz, 76 Hackensack Street, East Rutherford, New Jersey, age 36, five foot eight, 150 pounds, ruddy complexion, brown eyes, brown hair, bad burn scar on end of spine, both legs bruised, small black mole on top of left wrist, may be wearing blue dungarees, black dress shoes. Missing since 1900 12/25/49. Last seen on the Pennsylvania Tugboat Altoona docked at Pier H, Jersey City. May have fallen overboard.

Q. What is the next entry in your police record?

A. The next entry is on the Second Precinct blotter about the recovery of the body.

Q. And what was the date of that entry?

A. That was on January the 31st.

Q. Would you read that to the jury.

A. At 11:55 a.m. a human body was found floating in the water off Pier F by Captain Adams of the Pennsylvania Railroad Tug Harrisburg. Body was that of August Schulz, age 36, resident 76 Hackensack Street, Rutherford, New Jersey. Employed as a fireman by the Pennsylvania Marine Division, Pier H, foot of Morgan Street, Jersey City. Reported for work at about 5:00 p.m., December 25, 1949 and was last seen about 7:00 p.m., same date, by James Corcoran, dispatcher for the Pennsylvania Railroad Marine Company. All of Schulz' clothes were found on the Altoona.

tugboat which was tied to the pier. Emergency Squad under the command of Captain Foley grappled for the [fol. 34] body but to no avail. Investigated by Captain Long, Detective Thomas Hines, Detective Hanley; and reported by Detective Hanley.

At 3:00 p.m. today body was removed to Skittoreeio's Morgue, where body was identified by his brother, William Schulz, age 28, resident 3211 Norwood Drive, Fairlawn, New Jersey, as that of his brother. Report sent to Inspector Hoe. Medical Examiner's office notified. Body was brought ashore by the Police Emergency Squad in command of Captain Foley. Pronounced dead by Dr. McNulty of the Medical Center ambulance. Removed to Skittoreeio's Morgue accompanied by Detective Hanley and was reported by him. When body was found in the water there was a flashlight in one of his hands.

* * * * * * * * *

MELVIN PAUSLEY, Direct.

* * * * * * *

Q. Were you employed by The Pennsylvania Railroad on December 25, 1949?

A. I was.

Q. What was your position at that time?

A. Chief engineer.

Q. On December 25th or 26th of 1949, or in that month, were you assigned to any particular tug?

A. The Tug Altoona.

* * * * * * *

Q. And when did you take her out after she was brought in after Christmas Day?

A. On the morning of the 26th.

Q. That is the day after Christmas?

A. 8:00 a.m.

* * * * * * *

Q. And when you went aboard the tug, did you discover anything aboard that tug?

A. I did.

[fol. 35] Q. With reference to August Schulz?

A. I discovered clothes hanging in the engine room.

Q. And what clothes did you discover? And describe just what you saw and how it was in that engine room.

A. On a rack. Hanging on a rack in the bulkhead was a topcoat, a tie and a pair of street trousers, and on the cushion on a locker was a sort of a bag that he carries his working clothes in and a pair of overalls.

Q. Was that touched, the bag with the overalls and the working clothes?

A. Sir?

Q. Was it touched?

A. No, sir.

Q. It was still in the bag, closed?

A. The overalls had been taken out and were laying alongside of this bag that they carry their working clothes in.

Q. What kind of a bag was that?

A. Well, I didn't pay too much attention to it, but it is a canvas bag, like, I imagine.

Q. And when you saw this bag, was it open then?

A. It was partly open.

Q. And where was it resting at the time?

A. On a locker on the port side of the engine room.

Q. Is that the place where the firemen usually change their clothes?

A. Yes, sir.

Q. And you saw the working pants lying where, did you say?

A. There was this grip, you might call it, that was open. I saw a pair of overalls. It was open about half way, and there was a pair of overalls in that grip.

Q. They were still in the grip?

A. That's right.

Q. What else did you notice there at that time?

A. Nothing else in particular that I noticed, only that there was a pair of shoes under the clothing hanging on [fol. 36] the locker.

Q. What shoes were they?

A. Dress shoes.

Q. Dress shoes?

A. Yes, sir.

Q. And lunch? Did you see any lunch there?

A. I didn't see any lunch, no sir.

Q. Wasn't there a lunch bag there, too?

A. Not that I saw.

Q. Was there a paper bag there?

A. Well, there was a paper bag there, but I don't know what it might have been.

Q. Where was this paper bag?

A. Laying on the cushion alongside of this bag that he carried his clothes in.

Q. Was that still unopened, the paper bag?

A. Positive.

. . . . . .

Q. Did you find out later on to whom they belonged?

A. I found out the next day that they belonged to Schulz.

. . . . . .

MELVIN PAISLEY, Redirect.

. . . . . .

Q. Could you tell us the duties which a fireman has who has to watch a boat during the night, or over a holiday like Christmas Day, before the boat starts working the following day?

A. Well, his duties as a watch fireman consist of watching the water, the water in the bilges, the water in the boilers, keeping it at a safe working level, and to keep his fires with a certain amount of steam on the boiler.

Q. And was that necessary so that the boat could start out on December 26th for work?

A. Yes, sir, so that she will be near a head of steam when we report in the morning to take the ship into service.

. . . . . .

[fol. 37] Q. Now, when there is a lack of water in the boiler, is there some sort of an apparatus which puts water into the boiler?

A. There are two methods of pumping up a boiler, both by a feed pump and by an injector.

Q. Could you tell us something about the injector? What is that?

A. The injector is just an instrument that takes the water from the tank and pumps it to the boiler through steam pressure.

Q. How do you put the injector on?

A. Just by drawing back a lever.

Q. So the injector is put on manually by hand?

A. That's right, sir.

Q. And you have to use your hand in order to do it?

A. That's right.

Q. And when you pull this lever down, then what?

A. It closes what consists of an overflow valve in the injector and delivers the water for the boiler.

Q. And when is that injector taken off?

A. Well, when the proper level of water in the boiler is there, then you move what we call the cut-out on the injector.

Q. Is that also done manually by hand?

A. Yes, sir.

. . . . . .

Q. Now, with reference to a watch fireman, as you described it, and a fireman on a running tug, both of them take care of the boilers, don't they?

A. Yes, sir.

Q. Both of them take care of the bilges, don't they?

A. Yes, sir.

Q. And both of them take care of the steam?

A. To a certain pressure, yes.

Q. In one case it is less pressure and another case more, [fol. 38] but both types of firemen you just described have to take care of steam?

A. Yes, sir.

Q. Referring to a watch fireman on a tug that is tied up, is there anything more or less that he does than a fireman on a running boat that we have just described?

A. No, sir.

. . . . . .

Q. Well, in order to have a position as a fireman on a running boat or a watch fireman, they must be qualified firemen?

A. Yes, sir.

Q. The qualifications are the same, aren't they?

A. Yes, sir.

Q. And is it true, then, that as an opening occurs for a tug fireman, whether it is an opening as a route boat that is going to be out four or five days or a running boat which is going to be out for eight hours, or a watch fireman, depending on that opening as to the way that fireman is assigned?

A. A man is assigned according to the seniority on the vessel.

Q. He can be assigned to whatever job is open on those three types of boats?

A. Yes, sir.

Q. And when does the safety valve blow off?

A. When the boiler reaches the maximum pressure allowed by the government inspector.

[fol. 39] Q. And that is the maximum steam pressure?

A. The maximum steam pressure.

Q. Now, when the safety valve goes off, what is the requirement for a tug fireman? What is he supposed to do?

A. To cool his fires down as soon as possible.

Q. Does he then put the injector on?

Mr. Allen: Your Honor, we have been over this once before.

The Court: Are you making an objection?

Mr. Allen: Yes, sir.

The Court: Sustained.

Mr. Baker: We didn't go over that part, your Honor.

The Court: Objection sustained.

By Mr. Baker:

Q. When is the injector put on?

Mr. Allen: If your Honor please, I am going to make the same objection. It is repetitive, in addition to which, your Honor, I don't see where it is material, relevant or competent.

The Court: I will allow the answer.

A. The injector is only used when the water may be below the working level or in cooling down the boiler.

Q. Would it be used when it reaches its maximum steam?

A. To keep it below what we call the blower.

Q. Then you put on the injector?

A. Yes, sir.

Q. And is that necessary to do that in order to protect the boiler?

[fol. 40] Mr. Allen: Your Honor, I object to the form of the question.

The Court: Sustained.

. . . . . .

JOHN E. BARKER, Direct.

Q. Mr. Barker, are you employed at the present time with The Pennsylvania Railroad?

A. I am.

Q. In what position?

A. Fireman, tug fireman.

Q. Tug fireman?

A. Yes, sir.

Q. Did you have that same position on December 25, 1949?

A. I was a watch fireman that day.

. . . . . .

Q. Were you requested at any time during that day or night to check those boats?

A. I was.

Q. And who requested you to check those boats?

A. The crew dispatcher.

Q. What is his name?

A. Jimmy Corcoran.

Q. And what time was it that he asked you to check those boats?

A. When I came in, he told me to come back in the office as soon as I check my three boats, to go back in the office because he was short of firemen as far as he knew then.

And then, when I come back in, he says, "Go check the boats because Schulz is coming in. Check these four boats and report back to the office."

. . . . . .

[fol. 41] Q. What time did you get aboard the boats which you were to check for Schulz?

A. Shortly after 4:00 o'clock.

Q. Where were those boats?

A. The third tier.

Q. Would you describe just how they were docked; which boat was first, and so on?

A. To the best of my knowledge, the Altoona, the Princeton and the Fort Wayne and the Williamsport.

Q. Were they all abreast of each other?

A. Yes.

Q. And the outmost boat was the Williamsport?

A. Yes.

Q. And the one nearest the dock was the Altoona?

A. The Altoona.

Q. Did you check all those four boats?

A. I did.

Q. At what time did you finish checking those boats?

A. Around 5:00, shortly after 5:00.

Q. Now, did you do anything with reference to those boats, or did you have to do anything with reference to the fires?

A. I pumped the boilers up with water, throwed coal on the fires, and pumped the bilges out as I went from one boat to the other.

Q. And you took care of the fires, too?

A. That's right, taking care of the fires, too.

Q. And when you completed taking care of the boats and the fires, how long would that ordinarily be good to keep those fires up?

A. Anywhere from an hour and a half to two hours.

Q. They would keep those fires up?

A. Yes.

The Court: You mean from 5:00 to about 6:30 or 7:00?

The Witness: Something like that.

[fol. 42] By Mr. Baker:

Q. Did you have to, in the course of your going over and checking those boats, put on any injectors to put in water?

A. In each one of the three steamboats.

Q. And did you take off those injectors on all boats before you left them?

A. I loaded the boiler up with water, then I shut the injectors off and shut the tank valves.

Q. So that you personally made sure that all the injectors were off on all four boats?

A. Three boats.

Q. What?

A. Three boats. One is a diesel.

Q. Is it three boats that you put on and took off the injector, and with what boats, would you tell us now?

A. The Altoona, the Princeton and the Williamsport.

Q. And then you came back to the office, did you say?

A. Yes, sir.

Q. At what time was that, about?

A. Right after 5:00 o'clock. Maybe a few minutes after.

Q. Did you see Schulz?

A. I walked down the dock with him.

Q. You saw him?

A. Yes, sir; I walked down to the office with him.

Q. Was that the last time you saw him?

A. That was the last time I saw him.

Q. Was that around 5:00 o'clock, would you say?

A. Yes.

Q. What was he doing at the time you saw him?

A. He was just getting in.

Q. Just getting into the office?

A. He went into the office, signed the sheet, you know, the one we got to sign up for the watch fireman, and he

said, "Well, I got to go and get the clothes out of the locker," and he asked me what kind of shape the boats were in and I told him, "Okay."

[fol. 43] The Court: What time was that?

The Witness: Between 5:00 and 5:30.

. . . . . .

HAROLD F. CUNLIFFE, Direct.

. . . . . .

Q. Now, on December 25th of 1949, were you assigned to do any work as a fireman by the crew dispatcher?

A. Yes.

Q. And who was the crew dispatcher when you were assigned?

A. Jimmy Corcoran.

Q. And what were your hours of duty on that particular day?

A. 5:00 to 1:00.

Q. That is 5:00 in the afternoon to 1:00 o'clock?

A. 1:00 o'clock.

Q. Were those the same hours that Schulz was assigned to, if you know?

A. I believe so, yes.

Q. And what tugs were you assigned to?

A. In the second tier, the Johnstown and the Wilmington.

Q. There were two tugs in the second tier?

A. That's right.

Q. And what tugs was Schulz assigned to—in what tier?

A. Well, he was in the third tier.

Q. And how many tugs were in the third tier?

A. Four.

Q. Four abreast of each other?

. . . . . .

Q. Now, with reference to the tugs as they were that day between 5:00 o'clock and 1:00 o'clock that morning, were there any lights on any of those tugs?

A. No, sir.

[fol. 44] Q. All unlighted?

A. All unlighted.

Q. And were the tugs dark?

A. Yes.

Q. Did you, in going from one tug to the other tug on the outer side of the tug, use a flashlight in going from one tug to the other?

Mr. Allen: May I have the same objection? There is no testimony here as to the fact that the seaman was going from one tug to the other.

The Court: Objection sustained.

* * * * * * * *

CHARLES HOWARD ANDREI, Direct.

* * * * * * * *

Q. Were you employed by The Pennsylvania Railroad on December 25, 1949?

A. I was.

Q. Are you now working for The Pennsylvania Railroad?

A. No, sir.

Q. And at that time what was your job?

A. I was a tug fireman.

Q. What time were you assigned to go to work that night?

A. From 11:00 p. m. until 7:00 a. m. in the morning.

* * * * * * * *

Q. And what tugs were you assigned to?

A. I believe it was the Princeton and the Williamsport.

Q. And where were those tugs at that time?

A. They were in the third tier outside of the Altoona.

Q. Were they all abreast of the Altoona?

A. All abreast.

Q. Where was the Williamsport with reference to the dock?

A. It was the fourth boat out, the outermost boat.

Q. It was the furthest boat out?

A. Yes, sir.

Q. Now, when you got aboard those tugs, were you told [fol. 45] whom you were to relieve?

A. No, not that I recall. I was just assigned to those boats and I went on them.

Q. Did you know that you were to relieve Fireman Schulz?

A. No, sir.

Q. Do you know now that you were taking some of the boats which Fireman Schulz had?

A. Yes, sir.

Q. And you came aboard at what time, would you say?

A. Not too much after 11:00, because, if I recall correctly, there would be mention that we were short—

The Court: Will you please raise your voice.

A. If I recall correctly, I believe there was mention that they were short men on the middle trick and I was sent right out to go over and look at the boats right away.

. . . . . .

Q. What did you notice at the time when you got aboard these boats?

A. Well, the fires on the Princeton and the Williamsport were both in poor shape, and the injector had been on on the Williamsport.

Q. So that you saw that the fires on both boats were in bad shape?

A. Yes.

Q. Could you tell us in what respect? I mean, we would like to have a description of what you mean by "bad shape."

A. Well, let's see. Usually the fireman—before I had been on the *the* boat—before he leaves—they usually coal them over, and they are all blacked out——

The Court: Will you raise your voice.

A. —the fires are completely blacked out with coal, and [fol. 46] when I went on the boat they had not been blacked out. They was just all red coals.

Q. And you attended to these fires?

A. Yes, sir.

Q. And from what you observed at that time, these two tugs there, were they being attended to or not being attended to?

A. Not within the last three hours or so.

. . . . . .

The Court: Did you see anything on the Williamsport?

The Witness: Well, it was in my statement——

The Court: I didn't ask you that.

The Witness: The condition of the fires and that the injector had been on.

By Mr. Baker:

Q. And the injector was on the Williamsport?

A. Yes, sir.

Mr. Allen: Your Honor, he didn't say that about the Williamsport, and now Mr. Baker is leading. I don't know what he is up to.

Mr. Baker: Do you want him to read it back?

The Court: Where was the injector?

The Witness: On the Williamsport.

By Mr. Baker:

Q. And it was on at the time when you saw it: is that what you said?

A. Yes, sir.

Mr. Allen: May we fix the time, sir?

[fol. 47] Q. When was the time?

A. Well, about the time we got on the boat, about 10 after 11:00, quarter after 11:00.

. . . . . .

Q. Will you tell us when does a tug fireman put on an injector?

A. When the boiler needs water.

Q. And how is it put on by the tug fireman?

A. You have a steam valve to open and a water valve, and then there is a handle there which you pull back and forth, which you pull back and it permits the steam to come in and draws them water into the boiler.

Q. And is that operated by hand?

A. Yes, sir.

Q. And that is done by the tug fireman?

A. Yes, sir.

Q. What does that do with reference to supplying the water to the boiler?

A. Well, it also knocks down the steam when the cold water is going into the boiler.

Q. How is that injector taken off?
A. By hand.
Q. By hand?
A. Yes, sir.
Q. How do you do it by hand?
A. I just push the lever back up and close the steam valve and the water valve.

* * * * * * * * *

"Q. And when is that injector taken off by the tug fireman?"

Direct Examination.

By Mr. Baker (Continued):

Q. Would you answer that, please?
A. Well, when the boiler is full of water or has reached the required level and then you shut the injector off.
[fol. 48] Q. And generally how long a period is that usually?
A. Well, it depends on the amount of water alrgady in the boiler. If you have low water it will take, depending on the amount of steam, sometimes over a period of an hour or two hours, and if you have plenty of water, just for a short period of time.

* * * * * * * * *

Q. Were those two tugs, when you went aboard them on on that night, lighted or unlighted?
A. Unlighted.

* * * * * * * * *

Q. Were there any lights at all upon these two tugs when you went aboard these tugs that night?
A. No, sir.
Q. Were they light or dark?
A. They were dark.

* * * * * * * * *

Q. Did you use, in working aboard these tugs, any means of lighting?

A. If I recall correctly, I think I had either a flashlight or a lantern which we have available on the dock.

. . . . . .

Q. Now, will you tell us when it is that the safety valve goes off as you just mentioned a little while ago?

A. When your boiler builds up an excessive amount of steam so as not to cause any damage to the boiler, the safety valve releases this excess steam and, as your pres- [fol. 49] sure goes down approximately 10 pounds and the safety valve cuts off, the boiler ceases to blow off.

Q. And when this blow-off occurs or the safety valve releases steam, as you say, does it make any noise or any sound?

A. Yes, sir.

Q. And what type of a noise? Would you describe it to this Court and jury?

A. It is a very loud hissing noise.

Q. And what is the duty of the tug fireman when he hears such a noise?

Mr. Allen: I object to the form of that question. There is no testimony that anybody heard such a noise.

The Court: Sustained.

. . . . . .

Q. Did you find the injector on when you came on board the Williamsport?

A. Yes, sir.

Q. Did you do anything?

A. The injector was on but it wasn't pumping water and the boiler had already been filled up and you just hear the hissing of the steam. When the boiler fills up with water it stops taking water, and in order to stop the steam you have to take this handle and push it up to stop the steam from getting that hissing noise and getting your injector hot.

. . . . . .

A. Well, it indicated that the boiler had needed water and someone had put the injecter on to put water into the boiler.

. . . . . .

[fol. 50] Q. In the course of your work, do you cross from one tug to the other tug?

A. Yes, sir.

Q. And in crossing that particular night, did you use a searchlight or any light?

A. Yes, sir.

Q. What did you use?

A. I don't recall whether it was a flashlight or a lantern.

Q. And would you describe to this Court and jury how, from your experience, is the crossing done?

Mr. Allen: Now, your Honor——

Mr. Baker: With the searchlight.

Mr. Allen:—I object to the form of the question. I have no objection to his——

The Court: Objection sustained.

By Mr. Baker:

Q. Would you describe to us how that evening, in accordance with your experience, was the usual crossings from one tugboat to another done?

Mr. Allen: Your Honor, I have the same objection as to the form of the question. Mr. Baker persists in asking the same question over and over again necessitating my making the same objection.

I object on the further ground that there is no testimony here with respect to the fact that the decedent crossed from one tugboat to another.

. . . . . .

[fol. 51] The Court: Well, I think there is a reasonable inference that this man, in the course of his employment on this boat, in view of the duties of keeping these fires going, crossed from one tug to another. We know that nobody saw him; we know that.

. . . . . .

The Court: As to your attempt to deduce from this man the possible reasons which might have induced this fellow to go out in his shorts, I can't let you get into that. I just can't.

. . . . . .

Mr. Baker: I am going to ask him under what circumstances would there be occasions when a tug fireman would be required to go out in his shorts in order to perform his work.

The Court: My position remains the same as when this problem originally came up. I can't possibly see how that can shed any light of any kind.

The problem I am concerned with now is this business of crossing over.

Mr. Allen: What Mr. Baker is trying to do is to have this witness testify not to the facts upon which inferences can be drawn but he is attempting to have him testify as to the inferences.

Mr. Baker: He is testifying as to his conduct now, and that is in all the cases, Judge, how these men do their work. [fol. 52] The Court: I am perfectly prepared to allow you to have this man testify as to how he does his work, but I don't see how you can go much beyond that.

Mr. Baker: How he crosses from one tug to the other and describe it to the jury to see whether or not they can raise a reasonable inference.

The Court: I think I am prepared to allow him to testify as to how he crosses from one tug to another.

Mr. Allen: Well, I have my objection on the record and I think your Honor sustained that objection several times during the course of the trial.

The Court: I know, but before there was absolutely nothing in here to suggest an inference that he might have gone from one tug to another. His clothes were on the first tug, but I think this evidence of the injector being on when the evidence indicated that it had been turned off before the deceased's trick, whom do you suggest turned the injector on?

. . . . . .

Mr. Baker: I will tell you where I am going. I will indicate from all these facts that the jury can raise the reasonable inference that while he was undressing, the fact that he was found—the clothes were found in an orderly condition on the first tug where he undressed, he was then found in his underwear with a searchlight in his hand, and

there is a necessary and reasonable inference that he was doing work of some sort in the performance of his duties.

Now, the fact that he was found with his underwear indicates that in the course of his dressing something happened [fol. 53] that was sudden that took him away from completing his change into his work clothes, and the only reasonable inference is that in the Tug Williamsport the steam blew off, the safety valve gave—went off, there was a sound and a noise, and in order to protect that boiler he then darted out, put on the injector, then came back and while on his way back, with his searchlight in his hand, he fell in between two tugs and never got back.

The Court: As to evidence which you have offered to adduce as to what circumstances would induce a fireman to go out on the deck in 10 degree weather—that is what you want to adduce; is that correct?

Mr. Baker: Under those weather conditions.

The Court: All right.

(Continuing) —I will not permit any such testimony and you object, is that it?

Mr. Baker: I except to the Court's ruling of this proposed evidence.

The Court: Now, let's get back to the crossing.

As to any testimony which you wish to adduce concerning the crossing, I will permit you to have this witness answer how he crosses, and that is not by way of setting any standard whatsoever, because at this point I don't know that there is any standard. I don't know that there is any custom and practice. I do not know whether there is any [fol. 54] method. I do not know whether there are any regulations or instructions telling a man how to cross from one tug to another.

And then I imagine the type of conditions or the location of tug to tug has something to do with the type of crossing, too. I imagine that there are no set or stated means of crossing, are there? You do not contend that there are, do you?

The Court: After reflection, please note my change in ruling as to Mr. Baker's being permitted to adduce testimony from the witness Andrei as to how he crosses from one tug to another and as to that no testimony will be permitted, and the objection of the defendant is sustained.

Mr. Baker: I would like to propound to this witness a question concerning the usual and customary manner of crossing from one tugboat to another under the conditions as existed on this evening of December 25, 1949.

Mr. Allen: I think your Honor's ruling encompasses that question.

The Court: I will not permit that either.

I understand your problem. It is a tough one, but it is no doing of mine.

. . . . . .

Mr. Baker: The defendant has conceded that it is an accident, so that in the various other cases which deal with [fol. 55] the problem of circumstantial evidence, all of these other inferences from which the jury can infer something other than an accidental death have been excluded by the admission of the defendants themselves.

So we are down to just one inference and that is an accident. Now, the question is, it is for the jury to determine from that point on, reasonably, that his accident and his death was contributed to by the negligence of the defendant because of the unsafe conditions that existed on those tugs.

To exclude me from presenting evidence as to the various crossings, how they are made, excludes from the jury factual evidence from which they can determine how these conditions arise: in other words, how does he conduct his work, how does he cross from one vessel to another. In his work it is necessary that he do that. I think the jury should know how that is done. That helps the jury to raise their reasonable inferences.

Certainly he fell in the water while crossing. He was found with a searchlight. There is no other reasonable explanation.

. . . . . .

Q. In crossing, in the course of your work with the conditions that existed on or about December 25, 1949, from one tug to another, were there any hazards or was that a hazardous undertaking?

Mr. Allen: Isn't that what your Honor ruled upon in chambers?

[fol. 56] Mr. Baker: I thought counsel was not going to make an objection to that question.

The Court: Objection sustained.

* * * * * * *

CHARLES HOWARD AXPEEL, Cross.

* * * * * * *

Q. There is no doubt in your mind that Mr. Schulz was a capable watch fireman, is there?

A. For two boats. Nobody was actually capable of taking care of more than two.

Q. Did you ever take care of more than two?

A. Yes, sir.

Q. And you could take care of them, couldn't you?

A. Not properly.

Q. What do you mean by "properly"?

A. Well, when you take care of more than two boats—two boats you can take care of and say that they are in proper shape at all times, whereas when you are taking care of more than two boats you have to spread out your time and you can't devote as much time to each boat.

Q. Well, you have to work a little harder; is that what you mean?

A. You have to work hard regardless.

* * * * * * *

Q. So that you could then put the injector on one boat and walk to another boat and put it on in the other boat if it needed water?

A. Yes, sir.

Q. And you could walk to the third boat, and the fourth boat, and put the injector on if the boilers needed water?

A. Yes, sir.

Q. And then you could walk back to the first boat and [fol. 57] see if water had flowed in? I am just describing to you a fact where, if you had put the injector on four boats, could you then walk from the fourth boat to the first boat to see if there was enough water in the boiler?

A. Yes.

. . . . . .

CHARLES HOWARD ANDREL, Redirect.

Q. Did the floodlights light up any portion of the tugs which were not adjacent to the pier but abreast of those tugs which were adjacent to the pier?

A. No, sir.

Q. And were those tugs, other than the part of the tug which was against the pier with the rest of the tugs, dark?

A. Yes, sir.

. . . . . .

Q. Is this the statement that you made——

Mr. Allen: I have no objection.

Q. —to Captain Wilson on December 27, 1949? Is that your signature there?

A. Yes, sir.

Mr. Baker: I offer it in evidence.

Mr. Allen: No objection, sir.

(Marked Plaintiff's Exhibit 13 in evidence.)

Mr. Baker: With the permission of the Court I would like to read just one question and answer at this time to the jury.

The Court: You may.

Mr. Baker: (Reading):

[fol. 58] "Q. What was the condition of the boats?

A. The fires on both tubs were in bad shape and on the Williamsport the injector was on about two hours."

. . . . . .

BERNARD P. CASAMENTO, Direct.

Q. Mr. Casamento, what was your employment on December 25, 1949?

A. My employment? My job that night, you mean?

Q. Yes, that night.

A. Watch fireman.

Q. And are you employed by The Pennsylvania Railroad at the present time?

A. I am not working for The Pennsylvania Railroad now.

* * * * * * *

Q. Was one of the tugs which you were assigned the Tug Altoona?

A. Yes, sir, I believe so.

Q. How many tugs were you assigned to that night?

The Court: On this evening, December 25th?

Q. Midnight, December 25th.

A. This evening I was assigned to two.

Q. Two tugs that night?

A. That's right.

The Court: What were they?

The Witness: One tug, I know, was the Altoona. The other tug I don't know. I don't recall.

[fol. 59] Q. When you arrived on the Altoona that particular night, which was about midnight, did you say, which would be the early hours of the morning of December 26th, then—

A. I arrived on the dock?

Q. No, on the Altoona. Now, when you first went on the Altoona; would you tell us what time that was, about?

A. That was about 12:30.

* * * * * * *

Q. When you stepped aboard the Altoona, which was about 12:30, December 26, 1949, what was the condition of the fires aboard that vessel?

A. They were poor.

Q. When you say "poor," would you tell us what you mean by that? Describe that.

A. By "poor," I mean there wasn't much fire, the amount.
Q. And what was the condition of the boiler?
A. It was low on water, if I recall correctly.
Q. That is the Altoona?
A. That is the Altoona.
Q. And what was the situation with reference to the steam aboard that boat at that time?
A. The steam was low.

The Court: This is at 12:30?
The Witness: Yes, sir, that's right, sir.

* * * * * * *

Q. Will you please tell us, from the manner in which you saw these fires on December 26th at 12:30 a. m. on the Altoona as to how long these fires were unattended to?
[fol. 60] Mr. Allen: I have the same objection, sir.

The Court: Assuming any normal or extraordinary or unusual conditions, or are you asking him to answer this as a general proposition without any knowledge as to any conditions, either usual or unusual in nature?
Mr. Baker: Assuming normal conditions.

* * * * * * *

A. Anywhere from two, three or four hours.

The Court: Two, three or four?
The Witness: Yes, sir.

Q. What light did you use?

* * * * * * *

A. I used my flashlight.
Q. Your own flashlight?
Q. Would you describe the lighting conditions which existed on board this particular tug, the Altoona, on this morning of December 26th of 1949?

Mr. Allen: Objection as to the form of the question, sir.
The Court: Were there any lights aboard the Altoona on this morning?
The Witness: No, sir, there weren't.

Q. Was the vessel, the Altoona, dark?

A. Yes, sir, it was.

Q. With reference to the floodlights which were on the pier, did it light up any part of the Altoona?

A. The part nearest the pier.

[fol. 61] Q. And the part that was furthermost from the pier, was that lighted or dark?

A. That was dark, sir.

Q. Now, are there emergencies when it is necessary for a tug fireman to put on an injector?

Mr. Allen: Objection as to the form of the question. I object to its materiality and relevancy, sir.

The Court: Sustained.

By Mr. Baker:

Q. During your experience as a tug fireman, have emergencies arisen wherein it was necessary to put on an injector?

Mr. Allen: Objection. It is immaterial, irrelevant and incompetent.

The Court: Sustained.

Q. What would happen to the boiler in the event that an injector is not put on?

Mr. Allen: Objection as to the form of the question.

The Court: Sustained.

[fol. 62] By Mr. Baker:

Q. Are there situations when it is necessary to put an injector on to protect the boiler of the tugboat?

Mr. Allen: Same objection.

The Court: What if the answer is yes, that there are such situations?

Mr. Baker: Then I will ask him to explain what these situations are.

The Court: I will not allow that.

By Mr. Baker:

Q. Are there any signs or noises indicated that water is needed in a boiler?

Mr. Allen: Objection as to the form of the question.
The Court: Sustained.

Q. And when it blows off steam through a safety valve, is there any noise made by that?
A. Yes, there is.
Q. A loud noise or a soft noise?
A. A loud noise.
Q. And what type of a noise is made?
A. Sort of a whistling noise.
Q. And if such a noise comes off a tug, how far could you hear it?
A. Sometimes a half mile.
Q. It makes a loud noise, then?
A. A very loud noise.
[fol. 63] Q. Would you hear such a noise, if it comes off a tug right on the pier, in the dispatcher's office?
A. Yes, sir.
Q. And what is that an indication of?

Mr. Allen: I object to the form of the question.
The Court: Sustained.

By Mr. Baker:

Q. When such a noise comes and you hear it from a tugboat, what does that indicate to you as a tug fireman?

Mr. Allen: Same objection, sir.
The Court: Sustained.

By Mr. Baker:

Q. Have you then a duty as a tug fireman to do anything with reference to the boiler when you hear such a noise?

Mr. Allen: Same objection.
The Court: Sustained.

Q. Would that create an emergency?

Mr. Allen: Objection.
The Court: Sustained.

Q. What would happen if there is a blow-off and you hear a whistle and it is not attended to? What would happen to the boiler?

Mr. Allen: Objection, sir.
The Court: Sustained.
[fol. 64] How do you stop the whistle or the noise of the blow-off?

Mr. Allen: Objection as to materiality.
The Court: Sustained.

Q. When you came aboard the Altoona at about 12:30 on December 26th, was the injector on or off?
A. It was off, sir.

By Mr. Baker:

Q. Well, how would you then go to the other boat? Describe that.

Mr. Allen: Objection as to materiality and relevancy.
The Court: Sustained.
Mr. Baker: He is describing his duties, your Honor.
The Court: Sustained.

Q. You would have to get out of the fire room, wouldn't you?

Mr. Allen: Objection.
The Court: Sustained.

Q. Was it necessary for you to use the flashlight when you were on the outside of the tug?
[fol. 65] Mr. Allen: Objection.

The Court: Objection sustained.

By Mr. Baker:

Q. Did you use your flashlight when you were on the Altoona that night when you were on the side of the tugboat away from the pier?

Mr. Allen: Objection as to materiality and relevancy?

The Court: Sustained.

. . . . . .

James H. Corcoran, Direct.

. . . . . .

Q. Have you also the work record of Mr. Schulz that we have asked you to produce?

A. I have the record as best I could get it, Mr. Baker?

. . . . . .

Q. On December 24th of 1949, what work was Schulz assigned to?

Mr. Allen: Objection. It is immaterial and irrelevant what Mr. Schulz was doing on December 24th.

The Court: You don't mean what he was doing; what he was assigned to.

Mr. Allen: What he was assigned to and what work he was doing.

[fol. 66] The Court: December 24th was the night before the accident.

Mr. Allen: We are concerned with December 25th, yes, sir.

The Court: Objection sustained.

. . . . . .

Robert J. Conlon, Direct.

. . . . . .

Q. And on December 25, 1949, were you employed by the Pennsylvania Railroad?

A. I was.

Q. And what was your job at that time?

A. Tug fireman.

. . . . . .

Q. What vessels or tugs were you assigned to on December 25th of 1949?

A. That I couldn't say. I came to work at midnight of the 25th.

Q. Do you recall starting work at midnight December 25th?

A. Yes, sir.

Q. What were your hours that night?

A. 12:00 o'clock to 8:00 in the morning of the 26th.

* * * * * * * * *

Q. Now, looking at the statement, will you now tell us what tugs you were working on that night?

A. The Alliance and the Lancaster.

* * * * * * * * *

Q. Your two tugs were in the fourth tier in the manner which you described?

A. Yes, sir.

[fol. 67] Q. Where were they located?

A. They were the fourth and third tugs out from Pier H. That would be south of Pier H.

Q. And in which tier were the other four tugs that we have been talking about that were Schulz' tugs, namely, Altoona, Princeton, Fort Wayne and Williamsport?

A. They would be on the third tier.

* * * * * * * * *

Q. And what did those floodlights light up that night?

A. The floodlights on top of the dispatcher's office were two distinct beams or cone-shaped lights that lighted the dock at Pier H.

Q. And did any of the—did the floodlights light up any portion of any of the tugboats which were docked at Pier H on the south side?

A. It would help to light any tug that was alongside of the pier itself.

Q. In what respect would it light the tugs that were right next to the pier?

A. The portion of the tug that would be necessary for you

to step on when you left the dock on to the tug, that part would be lighted.

Q. With respect to the portion of the tug that is on the side that is opposite the—the outboard side?

A. That was dark.

* * * * * * * * *

Q. And were the Williamsport and Fort Wayne the third and fourth boats out in the third tier—were they light or dark?

A. They were dark.

[fol. 68] Q. Tell us whether you observed any ice upon those—any one or more of those four tugs in the third that night, December 25th or December 26th of 1949?

* * * * * * * * *

A. There was ice on those four boats.

* * * * * * *

[fol. 69] IN UNITED STATES DISTRICT COURT

OPINION BY JUDGE EDELSTEIN—November 19, 1954

The Court: The proof in this case is, in its most favorable light, sufficient only to indicate that it is within the realm of physical possibility that the death was casually related to some negligence on the part of the defendant. But there is a complete absence of probative fact or circumstance which, in the light of ordinary experience, reasonably suggests such a conclusion. There is some evidence of negligence, and there is an accidental death. But there is not a shred of evidence connecting the two. There is not even the slightest clue to indicate a fall from a boat even in the proximity of an unsafe condition.

For the jury to arrive at the conclusion of casual connection, the vehicle could not be reasonable inference, but only sheer speculation. The difficulty is not that the evidence is weak or that an inference of causation drawn from the evidence would be improbable, but that there is an

unfortunate gap in the evidence resulting in the absence of a basis for the inference. It simply cannot be drawn from the evidence by even the most sympathetic consideration which a jury could be permitted to employ, including a measure of speculation. The jury may not be permitted to replace reason entirely with conjecture, and to permit them to pass on a physical possibility merely because it is a physical possibility would be to dignify imagination as sober judgment.

I am constrained, therefore, to grant the defendant's motion for a directed verdict on the ground that the plaintiff has failed to establish a basis on which the jury could return a verdict fastening liability for negligence on the defendant. I explicitly refrain from ruling on the issue of membership in a crew by the Longshoremen's and Harbor Worker's Compensation Act.

[fol. 70] District Court of the United States, Southern District of New York

Civil Action No. 59-115.

Cal. No. —

Alma Schultz, administratrix of the Estate of August M. Schulz, Plaintiff

against

The Pennsylvania Railroad Company, Defendant

Judgment—Jury Trial—Judgment for Defendant, by Directed Verdict—November 19, 1954

The issues in the above entitled action having been brought on regularly for trial before the Hon. David N. Edelstein, and a jury on Nov. 10-12-16-17-18-19, 1954, and the Court having directed a verdict in favor of the defendant, it is

Adjudged: That the defendant have judgment against the plaintiff.

Dated, New York, Nov. 19, 1954.

William V. Connell, Clerk.

[fol. 71] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Civil Action No. 59-115

ALMA SCHULZ, Administratrix of the Estate of August M. Schulz, Plaintiff-Appellant,

against

THE PENNSYLVANIA RAILROAD COMPANY, Defendant-Appellee.

Appendix to Defendant-Appellee's Brief

On Appeal from the United States District — for the Southern District of New York

EXCERPTS FROM STENOGRAPHER'S MINUTES

Corcoran—Direct.

By Mr. Baker:

. . . . . .

Q. What are your duties as a crew dispatcher in general?

A. You assign men to vacancies on boats; you assign men to vacancies where you need men to watch boats, or outside floats, or we have tugboats at drydocks, we send a man to watch them; to fill the vacancies in extra jobs.

. . . . . .

By Mr. Baker: You assign crews to tugs only; is that it?

A. I don't assign only crews, I assign men to the various vacancies, and that might be a boat against the dock and it might be an outside float that might require a float man to watch it.

. . . . . .

[fol. 72] Q. Usually you assign a man to how many boats?

A. There are no given number of boats.

Q. Is it usual to assign a man to four tugboats?

A. It is not unusual.

. . . . . .

Cross-examination.

By Mr. Allen:

Q. Mr. Corcoran, I think you told the Court and jury that there weren't any lights on any of these boats to which Mr. Schulz had been assigned; is that correct?

A. I believe I did say that, yes.

Q. Were there any lights in the vicinity at all?

A. There were flood lights on top of the crew dispatcher's office, which is on the outer end of Pier H.

Q. How far from the Tug Altoona and that tier? I think you told us that was the third tier; is that right?

A. That's right.

Q. How far from that tug were these lights located?

A. I would say about 275 to 300 feet.

Q. Did those lights illuminate that entire pier?

A. They illuminated the pier, but you have other lights coming from the other end, floodlights.

Q. Tell us what other floodlights are there.

A. They are up in the yard, which is about 200 feet from the pier, I imagine. I think there are about six lights in the series of the floodlights.

Q. Does that illuminate—all those lights, do they illuminate all that pier there?

A. Yes, sir.

[fol. 73] Q. In addition to that I think you said the men carried flashlights.

A. Yes, they do.

* * * * * * * * *

Q. Mr. Corcoran, were any of these four boats which Mr. Schulz was assigned to watch scheduled to go out on a run during the middle trick on December 25, 1949?

A. No, sir.

Q. When those boats go on a run, how many men comprise the crew?

A. Seven men.

Q. What are those seven men?

A. Captain, mate, two deckhands, engineer, two firemen.

Q. On the night in question on December 25, 1949, when Mr. Schulz was assigned to these four boats, was he

accustomed to go home after he had completed his assignment?

A. Yes, sir.

Q. And sleep ashore; is that correct?

A. Yes, sir.

Q. Do you know whether or not Mr. Schulz held any seaman's papers?

A. I don't know.

Q. Did he sign any articles with respect to any ship?

A. I don't know that either.

Q. Were his time records kept in your office; that is, for this particular trick?

A. Do you mean did we keep a record of his time?

Q. Time in and time out.

A. Yes.

Q. In your office on the dock; is that correct?

A. That's right.

Q. Mr. Schulz—did he keep his clothes in a locker on the pier?

A. I am not sure whether he kept them in a locker or as some men do at times keep them aboard one of the tied up boats. They are supposed to keep them in the locker.

[fol. 74] Q. The watch firemen are supposed to keep their clothes in the locker?

A. The extra men.

Q. Where are the lockers located?

A. At 3 and 4 Bridge, which is at the bulkhead, north side of Pier H.

Q. That would inboard?

A. Inshore.

Q. On Pier H?

A. Just north of Pier H.

Q. Were any logs kept aboard these boats during the middle trick on December 25, 1949?

A. These four boats?

Q. Yes.

A. No, sir.

Q. Are logs kept when the boats are under way?

A. Yes, sir.

Q. Mr. Corcoran, do you know how Mr. Schulz happened to be in the water?

A. No, sir.

Q. Do you know of anybody who does?

A. I don't.

* * * * * * *

Corcoran—Redirect.

By Mr. Baker:

* * * * * * *

Q. The job of fireman, is that the job of a fireman?

A. Yes, it is.

Q. Was that the same type of work the fireman does in general when the vessel is operating?

A. I would have to say no to that.

Q. What is the difference when a vessel is operating—what does he do?

A. When a vessel is operating the tug has two firemen; one man works four hours on what he calls fire watch—he takes care of the fires—and the other man is on oil watch—he is in the engine room—to keep the engine lubricated to see nothing runs hot. Then they switch off after the four hours. They have to keep a full head of steam [fol. 75] when the boat is in operation whereas, they don't do that when she is tied up.

* * * * * * *

Q. You talked about floodlights. What floodlights were there at this particular place where these tugs were tied up at Pier H, Jersey City?

A. At the outer end above the crew dispatcher's office.

Q. How many floodlights were there?

A. One on the north side and one on the south side—two.

Q. Did you go on the pier that day?

A. I was on the pier, yes.

Q. Is that on top of your office?

A. Those two are, yes.

Q. Which way were those two floodlights facing?

A. Facing inland, which is west.

Q. So they were facing inland towards the landing?

A. Yes, sir.

Q. And there are tracks here where the land is, where these floodlights are facing, railroad tracks?

A. Yes.

Q. And these tugs would be off to which side?

A. Looking away from the lights, they would be to the left.

Q. And on this particular occasion these four tugs were out, into the river, away from the light?

A. As I said, I am not sure there were four abreast; but there were four there.

Q. These lights you say lighted up the pier there—the dock, the pier?

A. Yes.

Q. Did you say there were other lights going in the opposite direction?

A. Yes, sir.

Q. Where?

A. They were up in the yard.

[fol. 76] Q. When you say the "yard," you mean back here on the land?

A. West, yes.

Q. I am trying to find out how that light is that you are facing.

A. I can tell, or try to tell you or give you an estimate: The pier is, I think about 600 feet long—the pier.

Q. So you first—is that light beyond the pier?

A. Yes.

Q. You then have 600 feet; right?

A. Yes.

Q. That is the pier?

A. Yes.

Q. Then what is after the pier?

A. Then you come to land.

Q. Then that is the entrance, that land, where you get into the pier?

A. Yes.

Q. Then you have how much land before you come to these other lights that you are talking about?

A. About 150 feet.

Q. Another 150 feet?

A. Yes.

Q. Then you have these other floodlights facing this direction.

A. Yes.

Q. That is 750 feet away from dispatcher's office?

A. Approximately, yes.

* * * * * * *

Corcoran—Recross.

By Mr. Allen:

Q. With respect to the end of the pier, where would the third tier of tugboats be located; how far from your crew dispatcher's office?

A. From the outer end of the pier?

[fol. 77] Q. Yes.

A. The tugboats were approximately 96 foot to 100 foot long, and these boats were in the third tier. You have a little space in between.

Q. So how far from the crew dispatcher's office would the third tier be?

A. Two hundred fifty feet.

Q. Would the light from the floodlights above the crew dispatcher's office illuminate that portion of the pier?

A. Yes.

Q. And would some light from the yard go out there?

A. Yes.

Q. It would give some light?

A. Yes.

* * * * * * *

Corcoran—Redirect

By Mr. Baker:

Q. Did you go aboard these tugs at all that night?

A. I don't think I did.

* * * * * * *

Stetson—Direct.

By Mr. Baker:

Q. You went on at 11:10, is that right?

A. Yes.

Q. What did you do when you first came on duty that night?

The Court: 11:10, December 25th.

A. When I came on duty, naturally I changed my clothes and I went down to the first tier of boats, the second tier of boats, the third tier of boats; I went through all the boats, completely through.

[fol. 78] At 11:10, I didn't come back into the dispatcher's office until about 20 minutes after one. I had to cover 23 boats.

Q. Then what did you do?

A. I looked at the water in the bilge. There was some in there, and it wasn't too dangerous. I went over and looked at the water tank to see how much water was in there. I traveled over to the Princeton, which was next to it.

Q. Tied abreast of it?

A. Yes. She had low steam. The boiler was all right. The fires were practically out. She had a line that was attached to her, a steam line over to the Fort Wayne, giving that boat steam.

Q. Was the Fort Wayne the third boat abreast?

A. That's right.

I went aboard that boat and looked her over to see if there was any water. She is a diesel job, and naturally you have to see there is no water in there. She is a diesel electric job. It was all right there.

Then I continued on. I didn't go back to the office or anything. What I did before I left, I put coal on those fires, on both of those boats, to save them.

Q. Were they kind of neglected, those fires?

A. Sure.

Q. Did you see anybody aboard any of those boats, that whole third tier?

A. No, I did not.

Q. Someone was supposed to be aboard, you knew that?

A. Yes.

Q. So that it would indicate that the boats were neglected?

A. They were.

[fol. 79] Q. How long did it indicate that somebody had not been taking care of that boat, either taking care of the fires or the water or anything as a fireman aboard those boats?

A. Looking at those fires, I knew those fires hadn't been touched for six to eight hours.

. . . . . .

Q. In your deposition on March 22, 1951, on page 96, you were asked this question, and did you give this answer:

"Q. That night did you make any investigation to see what had happened?

A. I looked around to see if there was anything the man could have slipped on or fell over, or there may have been something in the way, but everything was clear on the pier and on the deck of the boat. There was not anything in the engine room that you could trip over. I couldn't find anything"?

A. That's right.

. . . . . .

Q. Tell us when you used the flashlight or the railroad light when you stepped from one boat to another.

A. When I went to a pier that didn't have any light, I would have to use a light.

Q. How about this pier, the south pier where these tugs were tied up?

A. We didn't need a light there.

. . . . . .

[fol. 80] Stetson—Cross.

By Mr. Allen:

Q. I think you told us you look at the decks on these three tugs.

A. That's right.

Q. Did you find any ice on the three tugs?

A. No, sir, none at all.

Q. Did you find any foreign substance on any kind of the decks?

A. No, sir.

Q. I think you said you used your light. Did you use your light down in the holds of these tugs?

A. Inside I would use my light. Where I had to use it. Outside where it was light, I didn't have to use it.

Q. Where was the light coming from on the outside?

A. From the top of the building.

Q. Is that the crew dispatcher's office?

A. The building runs 40 feet square. It is a two-story building. It is not a shack. There are two pedestals on this building and on these pedestals are two huge floodlights. Each one of those lights has a 500-watt lamp in it, with a huge reflector. It shines down on to the pier; it is just like daylight down there.

Stetson—Redirect.

By Mr. Baker:

Q. You testified a few minutes ago that the floodlights lighted up just like daylight. What did it light up just like daylight?

A. Out from the dock and going three boats out, you get good light off those floodlights.

Q. Just like daylight?

A. Near where the Altoona was, it is just like daylight.

[fol. 81] Q. How about the boat next to the Altoona, the Princeton, the Fort Wayne?

Q. Would you answer that?

A. The lights on the building are high up, and they shine right down on those tugs, and you have light all along there.

Q. You would say it is just like daylight on all those tugs?

A. Not exactly like daylight on the outer boats, but the ones alongside of the docks, they are just like daylight.

Q. How about the one inside; for instance, the Princeton or the Fort Wayne?

A. The light is high enough it shines right down on the third tier.

Q. There is no need to have any light in crossing from one boat to another?

A. I didn't have to use no light.

Pausley—Recross.

By Mr. Allen:

Q. Well, an operating boat goes out into the stream, doesn't it?

A. Yes.

Q. It is plying back and forth up and down the harbor, is it not?

A. Yes, sir.

Q. And you have a chief engineer and two firemen in the engine room?

A. Yes, sir.

Q. And they have to be on board all the time?

A. Yes, sir.

Q. And they alternate watches?

A. Yes, sir.

Q. When you are a watch fireman, though, you are assigned to tugs which are tied up to the dock; is that correct?

A. Yes, sir.

[fol. 82] Q. When you are operating in the stream you have navigation lights on, do you not?

A. That's right.

Q. And there are certain rules of the sea which must be complied with?

A. Positively.

Q. When they are tied up at the dock, are there any navigation lights on those tugs?

A. No, sir.

By the Court:

Q. I would like to ask you one question. These plugs which you are talking about, are they composed of some alloy like those that are used in a sprinkler system, and when they are exposed to a certain temperature they melt?

A. That's correct, sir. It is an alloy. There are three or four different typeso f metal composed of the core.

Mr. Allen: When you went on board the Altoona on December 26th, was there anything wrong with these plugs?

The Witness: No, sir.

Barker—Direct.

By Mr. Baker:

Q. And you never saw him after that?

A. I never saw him any more.

Q. Now, when you were checking these four boats in the third tier, were you using your flashlight?

A. No. Only in the fireroom, because it was daylight yet then.

[fol. 83] Q. Was it dark?

A. No, it was still daylight outside. I had my flashlight when I went down below to check the boiler, that is all.

Q. Were you using the flashlight?

A. Down in the fireroom where I had to check the water in the boiler. It was still daylight when I checked it.

Barker—Cross.

By Mr. Allen:

Q. When you went on to the Altoona, the Princeton, the Williamsport, the Fort Wayne, was everything in order?

A. The fires was a little low when I went on.

Q. How about the condition of the decks?
A. It was clean as far as that is concerned.

Cunliffe—Direct.

By Mr. Baker:

Q. But Schulz had these four abreast of each other in the third tier, you know that, do you?
A. I am just going by what I heard.
Q. Now, did you see Schulz that day?
A. No, sir.

Cunliffe—Cross.

By Mr. Allen:

Q. Mr. Cunliffe, there are lights on this pier?
A. Yes.
Q. Were the lights on on this night?
A. Yes, sir.
[fol. 84] Q. And they illuminate all these boats?
A. In spots where it is dark, there are shadows.
Q. There are shadows on the boats, but, for the most part, the lights illuminate all the boats?
A. Yes.
Q. You don't know what was on the four boats to which Mr. Schulz was assigned, do you?
A. No, sir.
Q. These lights were on on that night.
A. Yes, sir.
Q. Was there anything that you noticed unusual on the docks or on the boats that you could tell us?
A. No, sir.

Andrei—Direct.

By Mr. Baker:

Q. Let's first find out, could you tell us from your experience as to how long a fire would stay on a boat of this type and how long it would go out.

A. As a watch fireman you don't carry as heavy a body fire as you would on a running boat, and I would say if the fires had not been taken care of in that six-hour period the fires most likely would have been out.

The Court: Most likely have been out?

The Witness. Yes, sir.

The Court: Would they or would they not have been out?

The Witness: They would not, in order to bring it up to a full fire.

Mr. Allen: May I have a preliminary cross examination, your Honor?

The Court: Yes.

[fol. 85] Preliminary Cross-examination.

By Mr. Allen:

Q. You don't know what the condition of the fires was at 5:00 o'clock, do you?

A. No, sir.

Q. And it would depend on how long the fires would go, would depend upon their condition, would it not?

A. Yes, sir.

Q. So you can't tell us, then, as to how long these fires had not been tended?

A. No. Well, I would figure, according to normal circumstances, not carrying the full body of fire, because you don't want the boat hot and blowing off all day——

Q. But you don't know whether, on these particular boats we are talking about, at 5:00 or 6:00 o'clock the normal conditions existed?

A. I can talk about general practice.

Q. I am talking about, specifically, it is possible that these boats may have been built up to a much larger pressure?

A. It wouldn't have been the practice.

Q. It is possible?

A. It is possible.

Q. And you don't know that?

A. No.

Q. Then you can't tell us as to when these fires were last attended?

A. Not knowing that, no.

. . . . . .

By the Court:

. . . . . .

Q. Now, take an extraordinary situation. Let's say the fire was built up to a great degree.

A. That fire would last definitely longer than three hours.

[fol. 86] Q. How long, would you say?

A. I would say about six hours, at least.

. . . . . .

Cross-examination.

By Mr. Allen:

. . . . . .

Q. Well, what I am suggesting to you, sir, is that, doesn't the crew dispatcher, in a situation such as I have described, where you are relieving a man watching four boats and you come in two hours before he is scheduled to end his trick, doesn't the crew dispatcher oftentimes keep you in the crew shack as an extra man, so to speak?

A. Depending on the conditions at the time.

Q. He does do that, doesn't he?

A. Depending.

Q. Will you tell the Court and jury, for example, under what conditions he would keep you at the crew dispatcher's shack until the middle trick had ended?

A. When he knew definitely that there were so many men out there, the capable amount of men already on the dock to take care of the boats properly.

. . . . . .

Q. Now, for how long a period of time can you put coal in one of those fires and keep it going?

A. Oh, around three hours—four hours.

Q. So that if you report on board the first ship, you can

coal that ship up so that it will hold for three hours; is that correct?

A. Yes, sir.

. . . . . .

Q. Now, I think you told us about a fire, that you could tell how long a fire had been burning by looking at it; is that what you told me?

A. Approximately.

[fol. 87] Q. Wouldn't it depend somewhat on the amount of coal with which the fire was started?

A. And the amount of coal that was kept on there.

Q. In other words, if you put in a big pile of coal, it might burn for four hours and it would get down eventually to a thin layer?

A. Yes, sir.

Q. And if you put in a short pile, it might burn for a half an hour and get down to the same thin, red layer; is that correct?

A. Yes, sir.

. . . . . .

Q. Let's assume that for any reason the fireman whom you relieved on this night in question wanted to leave his boats. Couldn't he have built the fire up much higher than he ordinarily would have built it? Let's assume he wanted to go get a cup of coffee. Couldn't he have built the fires up so that they would last a half hour longer than otherwise?

A. For the reason that you stated there would be no reason to build them up like that.

Q. Because he could go and get coffee anyway?

A. Yes, sir.

Q. And, as a matter of fact, you did that quite frequently?

A. Yes, sir.

Q. And most of the men did, too?

A. I couldn't say.

Q. When these men were assigned to watch the tugboats, it was quite frequent, was it not, that they left the tugboats either to answer a call of nature, get coffee, a sandwich, cigarettes, or something like that?

A. Yes. There was the cafeteria in the yard.

[fol. 88] Q. And they would be assigned to these boats, and they would leave these boats from time to time during the night; is that correct, sir?

A. They could.

Q. And they did?

A. I wouldn't say they did. I say I did.

Q. You did; that's right, sir?

A. Yes, sir.

Q. Now, with respect to this injector and an indication as to how much water is in the boiler—now, I may be naive on this, but wouldn't you have to know something about the rate of flow which that injector permits to go into the boiler before you could determine how long that injector had been in an on position?

A. That would help.

Q. Well, what I am talking about is simply this: If I fill a bathtub, and I turn the faucet on full blast, I will fill the bathtub in a shorter period of time than I will fill it if I put it on at a trickle, will I not?

Mr. Baker: Just a moment. I object to bringing the bathtub into this case. It has nothing to do with this case.

The Court: Overruled.

By Mr. Allen:

Q. Wouldn't I, sir?

A. Yes, sir.

Q. Now, let's take the injector. If the injector is on full blast, or is given a rate of speed of water going into that boiler, wouldn't that determine how long it had been on, in the same analogy?

A. Yes, sir.

Q. Now, Mr. Andrei, the floodlights on this pier or in the place are located on the crew dispatcher's shack?

A. Yes, sir.

Q. And there are floodlights also up in the yard further on land?

A. Up until today I never really noticed them.

[fol. 89] Q. The floodlights on December 25, 1949, were on, were they not, sir?

A. At Pier H, yes, sir.

* * * * * * * * * * * *

Andrei—Redirect.

Redirect examination.

By Mr. Baker:

Q. And those floodlights, what did they light up?
A. The dock and the inboard side of the tugboats.

* * * * * * *

Q. And would you please tell us where those floodlights provided light with reference to the tugs which were tied to that pier?

A. It lighted up the dock and the inboard side of the tugboats tied alongside the pier.

Q. When you say "inboard side," what side do you mean by that?

A. Well, that would be the side of the tug that is closest to the dock.

* * * * * * * *

Andrei—Recross.

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By Mr. Allen:

Q. Weren't you asked this question:

"Q. Did you have any difficulty getting aboard the boats"?

A. I had no difficulty, which does not mean that there was no difficulties present.

* * * * * * * * *

[fol. 90] By Mr. Allen:

Q. The floodlights of the crew dispatcher's office were on; is that correct, sir?
A. That's right, sir.

Q. And the Tug Altoona was in the third tier, which was approximately, to the best of your recollection, how far from the crew dispatcher's office?

A. From the crew dispatcher's office to the third tier?

Q. Yes.

A. Three hundred feet.

Q. I think you told Mr. Baker that the inboard side of these tugs—or, I think perhaps misquoting it. If I am, please stop me.

I think you told Mr. Baker that the inboard side of the tug next to the dock was lighted from the floodlight.

Q. Of the tugs.

Q. Let's take the Altoona.

A. That's right.

Q. Next to the dock?

A. That's right.

Q. Now, on the bow of the ship is there anything, any superstructure on the very front portion of the ship, the bow?

A. The pilothouse.

Q. But how far back from the bow of the ship is that?

A. Fifteen feet.

Q. Fifteen feet?

A. Ten to 15 feet.

Q. Would this light, coming from the present dispatcher's shack—how high are they, sir?

A. The lights?

Q. Yes.

A. 150 feet.

Q. Would they illuminate the bow of the Tug Altoona as it was berthed in the third tier next to the dock?

A. They would illuminate the bow of the Altoona.

Q. They would illuminate not only the inboard side of the bow but the outboard side of the bow; is that right?

A. Yes, sir.

* * * * * * *

[fol. 91] Q. Mr. Casamento, I think you told us, just to get back on the right track, if we may, that the floodlights illuminated the bow of the ship?

A. That's right.

Q. And now from the very prow or front of this bow there is no superstructure, nothing on the deck raised to a level for 15 feet back until you get 15 feet back; is that correct, sir?

A. That's right, sir.

* * * * * * *

Q. As a watch fireman on this night in question, you now recall you were assigned to the Altoona and the Pittsburgh; is that correct?

A. That's right.

Q. And you know that the Altoona lay alongside the dock in the third tier but you don't remember where the Pittsburgh was?

A. That's right.

Q. And in your tour of duty that night you found nothing unusual with respect to these boats?

A. Nothing that was unusual.

Q. Is this the statement which Mr. Baker had reference to before or I had reference to which you signed for Captain Wilson?

A. Yes, sir.

Q. That is two pages, is it not?

A. That's right, sir.

Mr. Allen: I offer this statement in evidence, your Honor.

Mr. Baker: I have no objection.

(Marked Defendant's Exhibit F in evidence.)

The Court: Is there any particular purpose for cluttering up the record with this?

[fol. 92] Mr. Allen: May I read it, sir?

The Court: Yes.

(Mr. Allen reads exhibit to jury.)

By Mr. Allen:

Q. Now, Mr. Casamento, you read a photostatic copy of this statement which was given to you by Mr. Baker, yesterday; is that right?

A. That's right.

Q. I call your attention to the particular question and this particular answer:

"Q. When you went aboard the Altoona, where did you go other than the fire room?

A. In the forward galley and the upper engine room."

and I will ask you to tell this Court and jury whether you were on the outboard side of the Altoona at any time during that night?

A. I don't remember, sir.

* * * * * * *

Q. At any rate, Mr. Casamento, I hand you your statement of December 26th or 27th and call your attention to that question and ask you whether or not that does not refresh your recollection as to what parts of the Altoona you went on board on that evening?

The Court: Does that refresh your recollection?

The Witness: Yes, it does.

Q. Will you tell the Court and jury what parts of the Altoona you were on that evening?

A. In the fire room, in the forward galley and the upper engineroom.

* * * * * * *

[fol. 93] By Mr. Baker:

Q. Mr. Conlon, are you presently employed by The Pennsylvania Railroad?

A. No, I am not.

* * * * * * *

Q. Now, was there any floodlight upon that pier?

A. Yes.

Q. And where were those floodlights?

A. From the top of the dispatch office.

Q. And would that, in accordance with this diagram on Plaintiff's Exhibit 15, be the boat master's office that is seen here?

A. That's right.

* * * * * * *

By Mr. Allen:

* * * * * * *

Q. How long are these tugs?

A. I would not be able to give you the answer.

Q. Give us an approximation as to how long these tugs are?

A. Fifty feet.

* * * * * * *

Q. Let's say, December 25, 1949, how much space between the tier of boats which you were watching and the tier of boats which Mr. Schulz was watching, which, I understand, is the third and second, or, as you put it, the fourth tier; [fol. 94] how much space between those boats from bow to stern?

A. Six to 12 feet.

Q. And it is very dark there, isn't it?

A. Yes, sir.

Q. Now, you tell the Court and jury, if it is that dark, how you could see ice on the boats in the next tier.

A. It is as dark as it is on any portion of the river on a starlit night.

Q. Were the stars shining this night?

A. I couldn't say for sure.

Q. Was the moon shining?

A. I couldn't say for sure. I had light, sufficient light to determine, to make the bulk of the boats out.

Q. You could make out the bulk of the boats; is that what you are telling us now?

A. That's right.

Q. You could make out the bow and you could make out the side; is that right?

A. Yes, sir.

Q. Now, again, will you please tell the Court and jury how you could see ice on the four boats to which Mr. Schulz was assigned?

A. It wasn't that sufficiently dark that I could not determine that there was ice on the boat.

Q. I am sorry, I don't understand your answer.

A. Let me rephrase that. It wasn't that sufficiently dark that I could not determine that there was ice on those boats.

Q. You could not determine there was ice on the boats?

A. I could determine there was ice in the boats.

Q. It wasn't that dark that you could see ice?

A. That's right.

Q. Was it any part of your job to look at these four tugboats, the Williamsport, the Fort Wayne, the Princeton and the Altoona?

A. No. Offhand I couldn't say it was.

* * * * * * *

[fol. 95] Q. Where did the light come from which enabled you to see the ice on these four boats you were just telling us about?

A. The atmospheric conditions of the night. Evidently when I said I ~~could see~~ the ice, I had sufficient evidence to be able to make out the ice on the boats.

Q. Was there sufficient light on your boat so that you could walk around without your flashlight?

* * * * * * *

A. Can I answer the question now?

Q. Answer yes or no, please.

A. Yes.

* * * * * * *

Q. Where was the ice which you saw on the Altoona?

A. On her front bumping mat.

Q. That is the only place you saw the ice?

A. As I recall now, yes, sir.

Q. Well, I want you to tell the Court and jury—you are under oath—is that the only place that you saw the ice?

A. Yes, sir.

Q. Is there any other document or statement which you ever made which will fresh your recollection to the contrary.

A. Not that I recall now.

Q. And where did you see the ice on the next boat outboard from the Altoona?

A. On her front bumping mat.

Q. And is that the only place you saw if on that boat?

A. Yes, sir.

Q. And what was the name of that boat without looking at the map?

A. The second boat on the third tier?

Q. Yes, sir.

A. Was the Princeton.

Q. And what was the next boat?

A. The Fort Wayne.

[fol. 96] Q. And where did you see the ice on the Fort Wayne?

A. Her front bumping mat.

Q. Any place else?

A. No, sir.

Q. And where did you see the ice on the fourth boat?

A. The front bumping mat.

Q. And that is the Williamsport?

A. Correct.

Q. Did you see it in any other place?

A. No, sir.

* * * * * * *

The Court: What is the front bumping mat?

The Witness: It is a huge collection of rolled hemp that is used as a cushion when a tug hits a dock or hits the side of a barge or a light.

The Court: And where is it located?

The Witness: It is on the front top of the bow, directly in front of the tug.

The Court: On the outside of the bow?

The Witness: On the outside of the bow, your Honor.

STIPULATION

Mr. Allen:

* * * * * * *

It is stipulated between the attorneys for parties that the Tugs Altoona, Princeton, Fort Wayne and Williamsport all exceeded 18 tons; that The Pennsylvania Railroad Company has secured payment for compensation as provided in

the Longshoremen and Harbor Workers' Compensation Act; that The Pennsylvania Railroad Company has employees engaged in marine or maritime activities and that [fol. 97] the Hudson River is a navigable stream of the United States; and that "The decedent's duties affected the interstate commerce aspects of the defendant's business."

Mr. Baker: I wouldn't stipulate that part. I don't think it has anything to do with the matter.

The Court: Do you need that?

Mr. Allen: I don't think so. I think it is sufficiently in the record.

Mr. Baker: I will stipulate to what Mr. Allen has stated with the exception of the statement as to interstate commerce so as to not require him to put in any formal proof, but with the understanding that I do not waive any of the rights to objections which the plaintiff has made to his defense of compensation under the Longshoremen and Harbor Workers' Act.

PSYCHROMETRIC DATA

DATE	7:00 A. M.				12:00 NOON				7:00 P. M.			
	Dry Bulb	Wet Bulb	Dew Point	Humidity (%)	Dry Bulb	Wet Bulb	Dew Point	Humidity (%)	Dry Bulb	Wet Bulb	Dew Point	Humidity (%)
1	39.8	36.1	31	71	45.1	36.9	25	45	42.0	36.0	27	55
2	41.1	36.4	30	64	41.4	38.2	34	75	40.0	39.0	38	92
3	32.0	29.0	24	72	36.2	31.3	23	56	34.0	29.0	20	56
4	29.2	27.4	23	77	39.1	34.3	27	62	43.0	38.0	31	62
5	36.0	33.4	30	78	42.9	35.2	23	45	36.3	32.0	25	64
6	32.0	29.2	24	74	35.9	30.0	19	50	32.0	26.8	16	51
7	39.6	38.0	36	87	37.5	36.3	35	91	42.7	36.7	28	56
8	27.3	23.3	14	56	35.9	29.0	15	42	32.8	27.8	18	54
9	26.3	23.0	15	62	32.4	27.0	16	50	31.8	25.9	14	49
10	31.7	27.1	18	57	37.9	30.8	16	40	39.1	35.3	30	70
11	40.9	40.0	39	93	44.8	43.0	41	86	45.9	43.9	42	86
12	50.0	49.5	49	96	49.0	48.7	48	98	56.8	56.0	55	94
13	60.0	59.0	58	94	44.8	44.0	43	94	42.8	36.8	28	55
14	35.0	30.8	24	64	36.0	32.2	26	68	35.0	32.4	28	75
15	31.0	26.9	19	61	30.1	25.4	14	50	29.1	24.0	11	46
16	24.2	20.5	11	56	26.5	23.0	13	56	32.0	27.1	17	54
17	26.7	24.8	21	79	31.3	30.9	20	50	40.2	35.0	27	60
18	44.0	41.3	38	80	49.0	47.0	45	86	52.0	50.0	48	87
19	48.9	48.2	48	95	52.4	49.8	48	84	48.9	44.8	41	78
20	39.0	37.6	36	89	49.0	42.2	34	56	46.0	41.1	35	65
21	42.2	40.5	38	87	47.9	44.8	42	79	53.2	49.9	47	80
22	48.5	47.5	46	93	59.0	54.2	50	73	60.2	56.5	54	80
23	59.0	55.2	52	78	47.7	47.0	47	99	40.0	37.2	33	77
24	31.0	27.5	20	64	36.4	29.0	14	40	36.0	29.2	16	44
25	32.6	27.8	18	55	37.9	30.4	16	40	40.3	36.4	31	69
26	47.0	44.9	43	85	51.0	49.7	48	91	54.9	51.4	49	79
27	56.7	56.3	56	97	58.9	58.3	58	96	60.6	58.9	58	92
28	42.8	36.2	26	51	45.0	37.5	27	48	42.0	35.0	24	49
29	38.0	32.6	24	57	43.7	36.7	26	50	34.0	28.0	16	47
30	23.2	19.2	5	45	28.2	21.8	2	32	30.0	23.0	1	28
31	22.8	18.8	6	49	30.3	25.3	11	44	37.8	31.9	22	53
Mn.	38.0	35.1	30	73	41.4	37.1	29	64	41.6	37.3	30	63
Nor.	32.2	....	..	73	36.7	....	..	60	36.2	....	..	67

REFERENCE NOTE: As of January 1, 1949, dewpoint values below 32° F. and relative humidity values at temperatures below 32° F. are expressed with respect to water rather than with respect to ice, as used prior to that date. Therefore, these hygrometric values before and after January 1, 1949, cannot accurately be combined without necessary conversion.

U. S. Department
of Commerce
Weather Bureau
New York 4, N. Y.
OFFICIAL BUSINESS
Permit No. 1C24

Nathan Baker
1 Newark St.
Hoboken, N. J.

Precipitation

Date	Beginning	Ending	Hourly Amounts																							Date
			A. M.												P. M.											
			0-1	1-2	2-3	3-4	4-5	5-6	6-7	7-8	8-9	9-10	10--11	11--12	0-1	1-2	2-3	3-4	4-5	5-6	6-7	7-8	8-9	9-10	10--11	11--12	
2	6:25 a. m. 11:00 a. m. 8:20 p. m.	7:05 a. m. 5:30 p. m. 9:15 p. m.	....	....	....	....	....	....	°T	°T	....	....	....	T.	.02	.07	.04	.01	.01	T.	....	....	T.	°T	....	....	2
3	12:25 a. m.	2:35 a. m.	°T	°T	°T	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	3
4	8:05 p. m. 11:10 p. m.	10 55 p. m 11:55 p. m.	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	.03	.03	T.	T.	4
7	3 25 a. m.	6:35 a. m.	....	....	....	°.01	°.03	°.04	†.01	....	....	....	....	....	...	....	....	....	....	....	....	....	....	....	....	....	7
8	7:03 p. m.	7:24 p. m.	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	°T	....	....	....	....	8
11	12:05 a. m. 7:00 p. m. 11 30 p. m.	7 20 a. m. 8:30 p. m.	T.	.01	.02	.03	.01	T.	T.	T.	....	....	....	....	....	..	....	....	....	....	....	T.	T.	....	....	T.	11
12	..... 3:20 a. m.	2:10 a. m.	T.	T.	T.	.04	.02	.04	.05	.01	T.	T.	T.	.01	T	T.	T.	.02	.01	T.	.03	.01	.03	.09	.03	.04	12
13	..... 4 35 a. m. 3:25 p. m.	2 10 a. m. 1:15 p. m. 6:10 p. m	.02	T.	T.	....	.03	.01	.01	.01	.03	.04	T.	.01	T.	T.	....	T.	.01	T.	T.	....	....	....	....	....	13
18	3 00 p. m. 3 45 p. m.	3 20 p. m.	....	...	....	....	....	....	....	....	....	....	....	....	....	....	....	T.	T.	.01	T.	T.	T.	.02	.03	.04	18
19	..... 11:40 a. m. 1.05 p. m.	11:15 a. m. 12 10 p. m. 1:20 p. m.	.03	.02	.01	.01	T.	T.	.01	T.	.01	.01	T.	T.	T.	T.	....	....	....	....	....	....	....	....	....	....	19
23	5:30 a. m 10:15 a. m. 11.05 a. m.	6:10 a. m. 10:45 a. m 5 35 p. m.	....	....	....	....	...	T.	T.	....	....	....	T.	.03	.02	.03	T.	.01	‡.02	.03	....	....	....	....	....	....	23
26	9:20 a. m. 8:05 p. m.	10 15 a. m.	....	....	....	....	....	....	....	....	....	.03	01	....	....	....	....	....	....	....	....	....	T.	.02	.10	.13	26
27	..... 12:35 p. m. 9 05 p. m.	11:45 a. m. 4 15 p. m. 11:55 p. m.	.12	.06	.09	.05	.02	.01	.01	.02	.01	.01	.01	T.	T.	T.	T.	T.	T.	T.	....	....	....	....	.01	T.	.01	27

° Snow. †Rain and snow mixed. ‡ Sleet and rain.

PLAINTIFF'S EXHIBIT 12

W B Form No. 1030—Met'l

U. S. DEPARTMENT OF COMMERCE

WEATHER BUREAU

MONTHLY METEOROLOGICAL SUMMARY

WITH COMPARATIVE DATA

OF

NEW YORK, N. Y.

BATTERY PLACE

FOR

THE MONTH OF DECEMBER, 1949

W. B. N. Y. 1-5-50: 2000.

December, 1949: Monthly mean temperature was the highest of any December since that of 1931. Daily temperature records were established as follows: on the 22d, maximum 62.2°, previous record 56.0° in 1875, mean 55°, previous record 51° in 1881; on the 27th, maximum 62.3°, previous record 59.1° in 1936, mean 59°, previous record 53° in 1881; on the 28th, maximum 59.6°, previous record 58.1° in 1936, mean 48°, equalling 48° set in 1940.

At 9 30 A. M. on the 25th, a sea-level pressure reading of 31.01 inches was recorded, equalling the record for all months established on January 27, 1927, and breaking the previous December record of 30.93 inches, set on the 28th in 1896.

Note: On some copies of the November 1949 Monthly Meteorological Summary, the following failed to print: prevailing wind direction on the 29th, southeast; depth of snow on ground, La Guardia Airport, on the 27th, Trace.

between the alleged negligence of the defendant, the Pennsylvania Railroad Company, and the accidental death of her intestate, August M. Schulz, for which she sues. Affirmed.

Nathan Baker, Hoboken, N. J. (Baker, Garben & Clazen, Hoboken, N. J., on the brief), for plaintiff-appellant.

Joseph P. Allen, New York City (Conboy, Hewitt, O'Brien & Boardman, New York City, on the brief), for defendant-appellee.

CLARK, Chief Judge.

Plaintiff sued for damages under the Jones Act, 46 U.S.C. § 688, because of the accidental death of her husband while he was employed by defendant as a tug fireman. His job entailed watching four tugboats docked for the night of [fol. 101] December 25, 1949, at Pier H, Jersey City, N. J. He was last seen alive early that evening, and his body was recovered from the waters near the adjacent pier F on January 31, 1950. Plaintiff appeals from a judgment upon a directed verdict granted by Judge Edelstein upon a motion by the defendant.

Plaintiff claimed that defendant had negligently failed to provide the decedent with a safe place to work. She alleged that the lighting of the pier was inadequate, that the barges were icy, and that the pier work force was undermanned. The evidence of such alleged negligence was slight, and perhaps at most only doubtfully sufficient to present a jury question as to defendant's breach of duty. But beyond this, there was no showing whatsoever that the alleged conditions were causally related to the accident. Plaintiff never contended that the ice completely covered the barges or that the pier or the barges were entirely shrouded in darkness. We have no way of knowing how or where the accident occurred, and cannot say that it was proximately caused by any default on the part of the defendant. Hence the defendant was clearly entitled to a directed verdict in its favor. *Johnson v. New York, N. H. & H. R. Co.*, 2 Cir., Feb. 7, 1955.

Affirmed.

Maximum wind velocity and direction — 30 miles or more per hour.

Date	A. M. 0-1	1-2	2-3	3-4	4-5	5-6	6-7	7-8	8-9	9-10	10-11	11-12	P. M. 0-1	1-2	2-3	3-4	4-5	5-6	6-7	7-8	8-9	9-10	10-11	11-12	Date
1																									1
2																									2
3			30-nw	33-nw	34-nw	35-nw	32-nw																		3
4																									4
5														31- w	30- w	30- w									5
6										32- w	36- w	44-nw	38-nw	40-nw	31- w	32-nw									6
7																		36- w	37- w	40- w					7
8	33-nw	32-nw	31-nw										31- w			30- w				32-nw					8
9													30-nw												9
10																									10
11																									11
12																									12
13						31-sw	34-sw	31-sw																	13
14																									14
15																									15
16																									16
17																									17
18																									18
19																									19
20																									20
21																									21
22																37-sw	34-sw								22
23												31-nw									35-nw				23
24																									24
25																									25
26																									26
27																					37-sw	35-sw		43- w	27
28	45- w	37-nw	34- w	32- w	32- w			30-nw	31- w	32-nw		31-nw	30-nw	34-nw											28
29							30- w	30- w			43-nw	45-nw	47-nw	37-nw	42-nw	40-nw	32-nw	32-nw							29
30												30-nw	30-nw												30
31																									31

December — Hourly Temperatures — 1949

Date	A. M. 1	2	3	4	5	6	7	8	9	10	11	12	P. M. 1	2	3	4	5	6	7	8	9	10	11	12	Date
1..	41	39	41	41	41	41	40	40	41	43	45	45	44	46	46	44	43	42	42	41	40	39	39	38	.. 1
2..	38	37	39	37	38	39	41	40	39	40	41	41	42	44	41	44	43	43	40	38	37	35	36	36	.. 2
3..	37	36	35	35	34	32	32	32	31	32	34	36	38	39	38	40	37	35	34	32	31	31	31	27	.. 3
4..	27	28	28	26	27	30	29	29	30	34	37	39	43	45	45	42	42	42	43	43	37	36	37	38	.. 4
5..	37	36	36	35	35	35	36	36	34	37	42	43	43	42	41	41	39	37	36	36	35	34	32	32	.. 5
6..	32	31	32	33	32	32	32	32	34	35	36	36	37	37	37	36	34	32	32	31	30	29	30	30	.. 6
7..	32	32	32	30	29	30	40	37	39	40	37	38	42	44	49	49	47	44	43	41	39	37	36	32	.. 7
8..	30	29	28	27	27	27	27	28	30	32	32	36	36	37	37	37	36	32	33	30	30	29	28	27	.. 8
9..	26	26	25	25	25	26	26	26	28	31	31	32	33	33	34	34	32	31	31	31	28	28	28	26	.. 9
10..	27	28	29	28	27	27	32	28	32	35	36	38	39	40	40	39	40	39	39	38	38	38	39	38	..10
11..	39	39	39	38	41	41	41	41	42	42	42	45	46	46	46	47	47	46	46	47	46	43	44	44	..11
12..	45	45	45	46	48	49	50	49	49	47	49	49	51	53	54	56	56	56	57	57	57	57	58	59	..12
13..	59	60	59	60	60	60	60	60	50	49	48	46	46	46	46	44	43	44	43	41	40	38	37	36	..13
14..	36	35	35	35	35	35	35	33	35	36	36	36	36	37	38	38	38	36	35	37	36	32	32	32	..14
15..	32	32	31	29	30	30	31	29	30	27	30	30	33	31	35	32	30	31	29	30	30	30	30	26	..15
16..	26	25	25	24	23	24	24	24	24	26	27	26	32	31	32	34	33	32	32	31	33	32	32	29	..16
17..	28	28	27	27	26	28	27	26	30	32	34	37	39	39	40	40	40	40	40	39	40	40	42	40	..17
18..	41	41	42	43	44	43	44	44	43	45	46	49	48	49	49	49	50	50	52	53	52	49	49	50	..18
19..	50	50	49	50	49	49	49	49	49	51	52	52	53	53	51	51	50	50	49	48	47	47	47	46	..19
20..	45	45	44	43	42	40	39	40	41	42	43	49	51	49	51	49	48	45	46	44	43	44	45	46	..20
21..	45	45	44	43	44	43	42	43	42	44	47	48	47	50	52	54	52	53	53	53	53	53	52	52	..21
22..	50	49	48	48	48	48	48	49	50	51	55	59	59	61	62	62	60	60	60	59	56	56	57	57	..22
23..	58	59	59	60	60	59	59	60	60	60	60	48	47	45	43	46	38	39	40	38	36	35	35	34	. 23
24..	33	33	32	32	32	32	31	31	33	35	35	36	38	40	39	38	37	36	36	36	34	33	33	32	..24
25..	32	32	34	34	33	32	33	32	34	36	38	38	38	39	40	40	40	40	40	41	41	41	41	42	..25
26..	43	43	44	45	46	47	47	48	49	49	50	51	53	53	54	53	53	54	55	55	55	56	56	56	..26
27..	57	57	57	59	58	57	57	57	57	57	57	59	60	61	62	62	61	59	61	60	62	60	60	60	..27
28..	56	53	50	48	45	44	43	41	42	44	43	45	47	47	49	48	47	43	42	40	39	38	37	38	..28
29..	39	38	37	38	38	37	38	39	40	43	44	44	44	46	43	40	38	35	34	33	32	30	29	26	..29
30..	26	26	25	26	25	23	28	23	22	24	26	28	30	31	33	36	32	31	30	30	26	26	26	25	..30
31..	25	24	23	22	22	23	23	23	24	25	27	30	33	37	38	40	39	37	38	38	37	36	35	32	..31

[fol. 102] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALMA SCHULZ, Adm., etc., Plaintiff-Appellant,

v.

THE PENNSYLVANIA RAILROAD COMPANY, Defendant-Appellee

JUDGMENT—May 3, 1955

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs taxed in favor of the appellee.

A. Daniel Fusaro, Clerk.

[fol. 103] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 104] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 7, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

WB Form No. 1033—Met'l

U. S. DEPARTMENT OF COMMERCE, WEATHER BUREAU

Monthly Meteorological Summary

WITH COMPARATIVE DATA

NEW YORK, N. Y. MONTH OF DECEMBER, 1949

75th Meridian (Eastern Standard) Time

CITY OFFICE, (BATTERY PLACE)

DATE	TEMPERATURE (Degrees Fahrenheit) Extremes Maximum	Extremes Minimum	Mean	Departure from Normal	DEGREE DAYS Daily	Totals Monthly to date	Totals Seasonal to date	PRECIPITATION (Inches) Total [Midnight to midnight]	Snowfall [Midnight to midnight]	Depth of Snow on Ground at 7:30 P. M.	WIND (Miles per hour) Average Velocity	Prevailing Direction	Maximum Wind Velocity	Maximum Wind Direction	Maximum Wind Time	SUNSHINE Character and Mean Time Sunrise	Sunset	Number of Minutes	Percent of Possible	Cloudiness [Sunrise to Sunset] (Sky Cover in 10ths; 10=cloudy)
F 1	47	38	42	+3	23	23	751	0	0	0	14.3	nw	28	nw	1:34p	6:59	4:30	344	60	4
F 2	44	35	40	+ 2	25	48	776	.15	T	0	12.0	nw	28	nw	11:17p	7:01	4:29	0	0	10
S 3	41	27	34	− 4	31	79	807	T	T	0	20.9	nw	35	nw	5:17a	7:02	4:29	567	100	3
S 4	46	26	36	− 2	29	108	836	.08	0	0	11.2	s	28	sw	8:12p	7:03	4:29	507	90	2
M 5	44	32	38	0	27	135	863	0	0	0	15.6	w	41	w	1:52p	7:04	4:29	520	92	3
T 6	38	28	33	− 4	32	167	895	0	0	0	20.2	w	44	nw	11:18a	7:05	4:29	429	76	3
W 7	50	28	39	+ 2	26	193	921	.09	1.2	T	16.8	w	40	w	7:47p	7:06	4:29	359	64	5
T 8	38	26	32	− 5	33	226	954	T	T	0	18.6	nw	33	nw	12:08a	7:07	4:29	558	99	1
F 9	36	24	30	− 6	35	261	989	0	0	0	17.9	nw	30	nw	12:51p	7:08	4:29	561	100	0
S 10	41	28	34	− 2	31	292	1020	0	0	0	5.7	ne	14	ne	8:02p	7:09	4:29	210	38	8
S 11	48	38	43	+ 7	22	314	1042	.07	0	0	6.6	ne	16	ne	3:08a	7:10	4:29	0	0	10
M 12	59	44	52	+16	13	327	1055	.43	0	0	14.1	s	28	s	10:21p	7:10	4:29	0	0	10
T 13	60	36	48	+13	17	344	1072	.17	0	0	21.1	nw	34	sw	6:25a	7:11	4:29	0	0	10
W 14	39	32	36	+ 1	29	373	1101	0	0	0	13.2	nw	22	nw	2:51a	7:12	4:29	200	36	10
T 15	36	26	31	− 4	34	407	1135	0	0	0	12.5	nw	22	nw	2:02a	7:13	4:30	510	92	2
F 16	36	23	30	− 5	35	442	1170	0	0	0	9.8	n	17	n	9:52a	7:13	4:30	557	100	0
S 17	43	25	34	− 1	31	473	1201	0	0	0	6.7	s	13	sw	10:55a	7:14	4:30	511	92	4
S 18	53	40	46	+12	19	492	1220	.10	0	0	9.6	s	22	s	7:21p	7:15	4:30	40	7	10
M 19	53	46	50	+16	15	507	1235	.10	0	0	12.5	n	19	sw	12:59a	7:15	4:30	0	0	10
T 20	52	39	46	+12	19	526	1254	0	0	0	10.0	n	16	s	10:35p	7:16	4:31	555	100	3
W 21	54	41	48	+14	17	543	1271	0	0	0	13.2	s	26	sw	6:06p	7:17	4:31	195	30	10
T 22	62	48	55	+21	10	553	1281	0	0	0	18.5	s	37	sw	3:23p	7:17	4:31	120	22	9
F 23	60	34	47	+14	18	571	1299	.14	aT	0	20.6	nw	35	nw	8:43p	7:17	4:32	50	9	10
S 24	41	30	36	+ 3	29	600	1328	0	0	0	16.0	nw	26	nw	1:35a	7:18	4:33	555	100	0
S 25	42	32	37	+ 4	28	628	1356	0	0	0	8.5	e	15	e	10:29p	7:18	4:34	279	50	5
M 26	56	42	49	+16	16	644	1372	.29	0	0	19.0	se	26	se	1:23p	7:18	4:35	18	3	10
T 27	62	56	59	+26	6	650	1378	.43	0	0	19.6	s	43	w	11:55p	7:18	4:35	0	0	10
W 28	60	37	48	+15	17	667	1395	0	0	0	22.6	w	45	w	12:17a	7:19	4:36	557	100	1
T 29	46	26	36	+ 4	29	696	1424	0	0	0	25.7	nw	47	nw	12:05p	7:19	4:37	558	100	1
F 30	38	21	28	− 4	37	733	1461	0	0	0	20.7	nw	30	nw	11:23a	7:20	4:38	558	100	0
S 31	41	21	31	− 1	34	767	1495	0	0	0	11.2	n	21	n	12:42a	7:20	4:38	558	100	2
Month	47.2	33.1	40.2	....	767	....	....	2.03	1.2	...	15.0	nw	....	....	....	....	....	9,846	57	5.4
Normal	42.1	28.8	35.0	....	940	....	....	3.62	6.4	...	16.6	nw	....	....	....	....	....	17,934	52	6.0

LAGUARDIA AIRPORT

DATE	TEMPERATURE (Degrees Fahrenheit) Maximum	Minimum	Mean	PRECIPITATION (Inches) Total [Midnight to midnight]	Snowfall [Midnight to midnight]	Depth of Snow on Ground at 7:30 P. M.
F 1	45	39	42	0	0	0
F 2	48	34	38	.28	T	0
S 3	38	28	33	T	T	0
S 4	44	25	34	.08	0	0
M 5	42	35	38	T	T	0
T 6	36	29	32	0	0	0
W 7	52	27	40	.13	1.2	0
T 8	35	26	30	T	0.1	T
F 9	33	26	30	0	0	0
S 10	38	25	32	T	0	0
S 11	45	37	41	.04	0	0
M 12	59	44	52	.47	0	0
T 13	61	36	48	.22	0	0
W 14	36	33	34	0	0	0
T 15	33	26	30	0	0	0
F 16	33	23	28	0	0	0
S 17	40	28	34	0	0	0
S 18	54	38	46	.07	0	0
M 19	54	48	50	.08	0	0
T 20	50	38	44	0	0	0
W 21	55	41	48	0	0	0
T 22	62	49	56	T	0	0
F 23	58	35	46	.21	aT	0
S 24	39	30	34	0	0	0
S 25	42	29	36	0	0	0
M 26	57	38	48	.25	0	0
T 27	63	54	58	.33	0	0
W 28	62	39	50	T	0	0
T 29	45	27	36	0	0	0
F 30	34	21	28	0	0	0
S 31	40	23	32	0	0	0
Month	46.1	33.2	39.6	2.16	1.3	...
Normal	....	....	....	....	....	...

ATMOSPHERIC PRESSURE
(Reduced to sea-level; millibars and inches)

Mean....1025.4 mb..... 30.28 in.
Highest..1050.1 mb.. 31.01 in. on the 25th
Lowest...1003.1 mb.. 29.62 in on the 7th
Highest recorded this month since 1882
1050.1 mb..... 31.01 in. on the 25th in 1949
Lowest recorded this month since 1882
972.9 mb..... 28.73 in. on the 24 in 1942

TEMPERATURE
(Degrees, Fahrenheit)

Highest ..... 62 on the 27th
Lowest ..... 21 on the 30th
Greatest daily range..... 28 on the 23d
Least daily range ..... 6 on the 27th
Average daily excess this month as compared with normal 5.2
Accumulated excess since January 1st 1551 6
Average daily excess since January 1st 4.2

MAXIMUM, MINIMUM AND MEAN TEMPERATURES AND TOTAL PRECIPITATION THIS MONTH

1871	58	-1	30	1.24	1900	56	12	35	1.98	1929	55	14	36	3.28
1872	47	2	27	2.54	1901	59	15	34	5.05	1930	66	9	35	2.65
1873	64	16	36	2.06	1902	54	8	32	6.19	1931	56	19	41	2.22
1874	50	6	31	1.69	1903	52	7	30	2.81	1932	52	12	39	2.62
1875	61	2	33	2.74	1904	52	9	28	3.87	1933	54	-6	33	3.33
1876	49	-2	25	2.29	1905	57	19	38	3.67	1934	64	10	33	2.43
1877	61	22	39	0.93	1906	57	8	33	3.53	1935	56	8	31	1.22
1878	56	16	36	4.93	1907	58	19	36	4.91	1936	62	12	39	7.03
1879	62	11	37	5.56	1908	64	20	35	8.21	1937	62	18	35	1.95
1880	56	-6	28	4.15	1909	54	6	31	5.00	1938	58	18	37	2.18
1881	66	22	41	4.87	1910	58	9	28	1.85	1939	59	12	36	1.22
1882	54	11	32	2.22	1911	60	18	39	3.89	1940	58	11	39	2.58
1883	54	4	31	3.40	1912	63	17	38	4.24	1941	60	14	38	4.12
1884	60	8	33	2.66	1913	58	19	39	2.40	1942	56	-8	32	4.31
1885	60	11	36	2.59	1914	61	4	32	4.01	1943	56	9	33	1.42
1886	51	14	31	3.73	1915	55	17	34	4.23	1944	55	12	32	3.16
1887	56	12	36	4.20	1916	62	15	34	3.97	1945	55	10	31	4.44
1888	65	18	41	1.41	1917	66	-13	25	3.70	1946	59	15	38	2.45
1889	65	13	41	1.41	1918	61	21	39	3.70	1947	58	16	34	3.87
1890	54	18	31	5.43	1919	50	07	30	2.58	1948	59	10	39	6.52
1891	58	14	42	5.30	1920	59	18	38	5.09	1949	62	22	40	2.03
1892	58	9	31	1.64	1921	68	4	34	1.89	....	....	....	....	....
1893	63	18	35	3.49	1922	66	18	34	3.29	....	....	....	....	....
1894	57	17	37	5.28	1923	54	24	42	3.76	....	....	....	....	....
1895	58	18	37	1.87	1924	51	11	34	2.98	....	....	....	....	....
1896	55	5	32	1.70	1925	57	7	34	3.33	....	....	....	....	....
1897	60	9	36	1.83	1926	67	7	29	3.72	....	....	....	....	....
1898	57	12	34	2.93	1927	67	15	37	3.39	....	....	....	....	....
1899	60	8	36	1.47	1928	56	20	39	0.85	....	....	....	....	....

WIND
(Miles)

Total movement 11,146
Maximum velocity..... 47-nw.on the 29th
Direction from(percent of time)

North	11	Southeast	4
Northeast	6	South	18
East	4	Southwest	11
West	17		
Northwest	29		
Calm	0		

Maximum velocity this month since 1912 ..... 69-nw on the 26th in 1915

WEATHER
(Number of Days)

Clear (scale 0 to 3) 14
Partly cloudy (scale 4 to 7) 4
Cloudy (scale 8 to 10) 13
With 0.01 inch or more precipitation.... 11
With 0.25 inch or more precipitation.... 3
Average number of days this month since 1871
Clear 8
Partly cloudy 10
Cloudy 13
With .01 inch or more of precipitation 11
With .25 inch or more of precipitation 4

MISCELLANEOUS PHENOMENA
(Dates of)

FOG:
Light (five-sixteenths to six miles) 2, 4, 5, 6, 7, 11, 12, 13, 18, 19, 22, 26, 27
Heavy (one-quarter mile or less) 11, 12, 18, 19, 22, 27
Glaze ..... None Sleet 23
Halos: Solar ..... None
Lunar ..... Aurora ..... None
Parhelia ..... None Hail ..... None
Haze ..... 17 Small hail ..... None
Thunderstorms ..... None

Freeze: [Not recorded before April 1, nor after the first killing in Autumn.]
Spring: Last Light ..... May 30
1949 Last Killing ..... April 2
Autumn First Light ..... November 6
1949 First Killing ..... November 22
Average date last killing freeze, Spring, April 11th
Latest date killing freeze, Spring, April 30th, 1875
Average date first killing freeze, Autumn, Nov. 6th
Earliest date first killing freeze, Autumn, Oct. 15, 1871

PRECIPITATION
(Inches)

Greatest in 24 hours this month ..... 0.69 on the 26-27th
Greatest in 24 hours this month since 1871 ..... 3.23 on the 13-14th in 1941
Greatest this month in

5 min	0.03 on 27th	30 min	0.08 on 27th
10 min	0.05 on 27th	1 hour	0.10 on 27th
15 min	0.06 on 27th	2 hours	0.26 on 26-27

Deficiency this month as compared with the normal 1.59
Total since January 1st 34.70
Accumulated deficiency since January 1st 8.29
Greatest snowfall in 24 hours this month ..... 1.2 on the 7th
Greatest snowfall in 24 hours this month since 1885 ..... 25.8 on the 26-27th in 1947
Greatest monthly snowfall since 1885 ..... 29.0 in 1947
Accumulated snowfall since Oct. 1st.. ‡1.7

DEGREE-DAY SUMMARY

Degree-Days: The number of degrees by which the daily mean temperature is less than 65°

Total this month	767		
Departure from normal, deficiency	173		
Total since September 1st	1495		
Departure from normal since September 1st, deficiency	561		
Percentage of normal heating season completed	35		
Total last season, September 1st– December 31st	1505		

Direction Indeterminate. ‡ Includes sleet; city average.
NOTE— T Trace { water, less than .01 inch. / snow, less than 0.1 inch. } {Clear in light; obscured in bold-face type.
Temperature, precipitation and wind in detail [OVER]
WB Form begins 11 24 p. m., December 21st. a Sleet

E. J. CHRISTIE, *Meteorologist, in charge*

EXHIBIT
U.S. Dist. Court
S.D. of N.Y.
NOV 17 1954

SUBSCRIPTION NOTICE

Price is 5 cents a copy; 50 cents a year. Checks and money orders should be made payable to the TREASURER OF THE UNITED STATES. Correspondence regarding subscriptions should be addressed to U. S. Weather Bureau, 17 Battery Place, New York 4, N. Y.

[fol. 99] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL—Filed December 3, 1954

SIRS:

Please take notice that the plaintiff in the above entitled case hereby appeals to the United States Court of Appeals for the Second Circuit, from the final judgment in favor of the defendant, entered herein on November 19, 1954, the Court having directed a verdict in favor of the defendant, The Pennsylvania Railroad Company.

Dated: New York, N. Y. December 3rd, 1954.

Nathan Baker, Attorney for plaintiff. Office & P.O. Address: 1 Newark Street, Hoboken, N.J. and 220 Broadway, Room 2104, New York City.

To: Conboy, Hewitt, O'Brien & Boardman, Attorneys for defendant, 39 Broadway, New York 6, N. Y.

[fol. 100] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALMA SCHULZ, Administratrix of the Estate of August M. Schulz, Plaintiff-Appellant,

v.

THE PENNSYLVANIA RAILROAD COMPANY, Defendant-Appellee

OPINION—May 3, 1955

Before Clark, Chief Judge, and Frank and Hincks, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, David N. Edelstein, Judge.

Plaintiff, Alma Schulz, appeals from a judgment upon a directed verdict dismissing her action under the Jones Act, 46 U.S.C. § 688, for failure to show a causal relationship

IN THE

Supreme Court of the United States

OCTOBER TERM 1955

ALMA SCHULZ, Administratrix of the Estate of AUGUST M. SCHULZ,

Petitioner,

—v.—

THE PENNSYLVANIA RAILROAD COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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41 Newark Street
Hoboken, New Jersey

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Cases:

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Statutes:

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IN THE

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OCTOBER TERM 1955

ALMA SCHULZ, Administratrix of the Estate of
AUGUST M. SCHULZ,

Petitioner,

—v.—

THE PENNSYLVANIA RAILROAD COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Alma Schulz, Administratrix of the Estate of August M. Schulz, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled matter.

The Opinions of the Courts Below

The oral opinion of Judge David N. Edelstein, granting the motion of the defendant for direction of verdict in its favor (p. 62a) is printed in the appendix hereto, and is unreported.

The opinion of the Circuit Court of Appeals for the Second Circuit by Chief Judge Clark is printed in the appendix hereto (pp. 30a and 31a) and is reported in 222 Fed. 2d 540.

Jurisdiction

The decision and judgment of the Court of Appeals for the Second Circuit, sought to be reviewed, was decided and entered on May 3, 1955.

The jurisdiction of this Court is found in 28 U. S. Code, Sections 1254(1) and 2101(c).

Questions Presented

1. Whether the Court of Appeals in affirming the judgment of the Court below erroneously differed with the opinion of the Court of Appeals for the Fourth Circuit in the case of *Sadler* v. *Pennsylvania Railroad*, 159 F. 2d 784, which held that proximate cause need not be established by direct evidence but may be proved by circumstances and which also held that it was for the jury to determine the cause of the fall from the reasonable inferences which cannot be said to be speculative.

2. Whether the Court of Appeals in affirming the judgment of the Court below erroneously deviated from the principles of law established by this Court in the case of *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916, and in failing to grant a retrial and permit the case to go to the jury to settle the dispute by choosing the most reasonable inference and that this did not involve speculation and conjecture.

Statutes Involved

"46 U. S. C. A. Sec. 688. Recovery for injury to or death of seaman.—Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with

the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

"45 U. S. C. A. Sec. 51. Every common carrier by railroad while engaging in commerce between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or territories and any foreign nation or nations shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees, of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Statement of the Case

This action was brought under the Jones Act to recover damages for the benefit of the widow and 2 infant children of the deceased by reason of his death resulting from the negligence of the Pennsylvania Railroad Com-

pany. At the time of his death he was 36 years of age and his widow was 31 [illegible] left 2 children, Judith, 3 years and Cynthia, 9 months. His earnings were $3000. per year and he was employed as a fireman by the defendant railroad (p. 41 Trans.).

On December 25, 1949 decedent, August M. Schulz Jr., was assigned as a fireman with a tour of duty from 5 p. m. to 1 a. m. the following morning. The dispatcher, James H. Corcoran, assigned him to watch 4 tugboats docked for the night at Pier H, Jersey City, New Jersey (p. 4a). He left his wife that Christmas Day at about 2:30 in the afternoon with his lunch packed in a paper bag (p. 3a). He phoned the dispatcher about 4 p. m. and told him he was going to be late (p. 4a). The dispatcher then called Barker, another fireman, and asked him to check the boats until Schulz arrived which he did (p. 5a). Schulz came in at 5:15 p. m. and the dispatcher told him Barker had checked the tugs (p. 5a). Barker testified that the dispatcher told him he was short of firemen and requested him to check the boats until Schulz came in (p. 33a), that the 4 tugboats, Altoona, Princeton, Fort Wayne and the Williamsport, were abreast of each other, that the one nearest the dock was Altoona and the 4th boat out was the Williamsport (p. 34a), that Barker pumped the boilers with water, threw coal on the fires and pumped the bilges as he went from one boat to the other and finished checking the boats shortly after 5 p. m. (p. 34a), that he put on the injectors to put in water and then took off all injectors on all boats before he left them (p. 35a) including the Williamsport (p. 35a), that he met Schulz and walked down to the office with him around 5 o'clock (p. 35a) and Schulz said "Well, I got to go and get the clothes out of the locker". (p. 35a).

The dispatcher, Corcoran, said Schulz left in his street clothes to go aboard the boats and returned a little after

7 o'clock and said he had just completed rechecking the boats and was going to change his clothes and go to work (p. 6a), that between 7 and 7:15 he left the office and walked in the direction of the tug Altoona where it was docked at the pier and that was the last he saw him (p. 6a).

Corcoran testified that Schulz was the only fireman attached to those 4 tugboats during the time mentioned (p. 8a) except for the time when Barker had them (p. 9a).

Frederick Stetson, assistant foreman of engines, stated his duties are the maintenance of the boats and he checks on everything (p. 14a). That night he was aboard the Altoona, the tug next to the pier, at about 12:15 and found the fires practically out (p. 15a), that the second time he went aboard the Altoona at about 1:25 a. m. he found Schulz's street clothes hanging in the upper engine room of the Altoona where the firemen usually undress (p. 18a).

Casamento was a fireman employed by defendant and Altoona was one of the tugs to which he was assigned on the evening of December 25th and he stepped aboard the Altoona about 12:30 a. m. and the fires were poor, the water in the boiler was low and the steam was low (p. 52a) and these fires were unattended to for 2, 3, or 4 hours.

Charles Andrei was a tug fireman assigned to work that night from 11 p. m. to 7 a. m. He was assigned to 2 tugs, the Princeton and the Williamsport, which was the 4th boat out (p. 37a). It was mentioned that they were short men and he went right over to look at the boats (p. 38a). He noticed the fires on both boats were in bad shape and that the injector had been on on the Williamsport (p. 38a); they were not attended to within the last 3 hours or so (p. 39a). The injector is put on when the boiler needs water and it is operated by hand and it is taken off by hand when the water has reached the required level (p. 40a).

The injector on the Williamsport was on when he saw it (p. 39a) about 14:15 p. m. that night (p. 40a). Andrei's statement made to Captain Wilson 2 days after the accident was offered in evidence and marked plaintiff's exhibit 13 (p. 50a) and it stated:

> "on the Williamsport the injector was on about two hours", (p. 51a).

Melvin Pausley testified that he was the chief engineer of the tug Altoona and took her out the following morning, December 26th (p. 27a), and discovered the street clothes of August Schulz hanging in the engine room, the place where they usually change their clothes, a canvas bag partly open, a pair of overalls was on a locker (p. 28a) and a pair of dress shoes under the clothes and an unopened paper bag (p. 29a).

Officer Brennan produced the official police records which showed the police grappling for the body of a male missing from a Penn tug since 7 p. m. December 25th (p. 25a).

In the police report of missing persons it stated:

> "Missing since 1900 12/25/49 last seen on Penn Tugboat Altoona docked at Pier H, Jersey City. May have fallen overboard" (p. 26a).

On January 31st at 11:55 a. m. the body was found floating in water off Pier F, Jersey City (p. 26a). He had on white shorts and black socks (p. 240 Trans.). This is the next pier to Pier H where the Altoona was docked.

> "When body was found in the water there was a flashlight in one of his hands" (p. 27a).

The autopsy report revealed no external marks and stated it was death by drowning. Plaintiff's exhibit 11

(p. 24a Trans.). The death certificate set forth the date of injury as December 25, 1949, as occurring while at work, and that the cause of death was drowning probably accidental (Exhibit).

It was conceded by the defendant that the decedent did not commit suicide, that there was no foul play (pp. 2a, 3a) and that he was not under the influence of alcohol (p. 11a). It was admitted that he met his death by accident (p. 2a).

As proof in support of her claim of negligence of the defendant, the plaintiff produced the witnesses who were employed by the defendant on the night in question. The dispatcher, Corcoran, stated there were no lights aboard these tugs (p. 8a), that in the performance of their work the firemen used a flashlight, because it was dark on these boats (p. 9a); the purpose of the flashlight was to be able to see better and check the water on the boats better and in order to get from one boat to another when he has a tier of boats to take care of. (p. 9a).

Frederick Stetson, assistant foreman, attempted to limit his testimony on deposition that while stepping from one boat to the other that night he was using his railroad light by stating in some circumstances he must use a light (p. 16a) otherwise he wouldn't be able to see anything (p. 17a) and then finally admitted it was the truth (p. 24a). Also, in Stetson's deposition he testified that they washed the decks down every night by the crew when they tie up (p. 19a) but at the trial did not know whether they washed it that night (p. 20a) and admitted it would not be proper to wash down the decks that night when the temperature was 10 above zero as you would have ice (p. 21a).

Cunliffe, a fireman aboard tugs in the 2nd tier that night, between 5 p. m. and 1 a. m., testified that the four tugs to which Schulz was assigned were unlighted and dark (p. 37a).

Andrei, tug fireman assigned to the tugs Princeton and Williamsport between 11 p. m. and 7 a. m., testified that the tugs were unlighted and dark (p. 41a) and that in crossing from one tug to another tug he used a flashlight or a lantern (p. 43a), that the floodlights did not light up any portion of the tugs other than the side of the tug against the pier (p. 50a).

Casamento, a tug fireman aboard the Altoona that night about 12:30 a. m., testified it was dark (p. 53a) and that floodlights did not light up the part furthermost from the pier.

Conlon, a tug fireman who started to work at midnight, the night in question, stated that the Williamsport and Fort Wayne, 3rd and 4th boats out, were dark (p. 60a), that the floodlights only helped to light up the position of the tug alongside the pier itself (p. 60a). He also testified to ice on the 4 boats in Schulz's pier (p. 61a).

Andrei stated that a fireman could not properly take care of more than 2 boats (p. 49a). All the tug firemen who testified stated that they were assigned to 2 tugboats that night.

The duties of a watch fireman are undisputed. Pausley, the chief engineer of the Altoona, stated it consisted of watching the water in the boilers, water in the bilges and to keep the fires with a certain amount of steam on the boiler (p. 29a). Schulz's duties were described by Stetson (p. 21a). The duties of a watch fireman and a fireman on a running tug are the same (pp. 30a-31a) except for the amount of steam pressure. The qualifications are the same (p. 31a); men are assigned according to the seniority to whatever job is open on 3 types of boats (p. 31a): a route boat that goes out for 4 or 5 days, a running boat which goes out for 8 hours or as watch fireman on a boat tied

up over night (p. 31a). Proof that Schulz was on a running boat the previous night, December 24th, was not permitted by the court (p. 58a).

At the conclusion of the case, the defendant moved for a direction of verdict in favor of defendant which the court granted (p. 62a).

On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was affirmed.

Reasons for Allowance of the Writ

The Court of Appeals for the Second Circuit in its decision affirming the judgment below, differed from a case involving similar facts decided by the Court of Appeals for the Fourth Circuit.

In *Sadler* v. *Pennsylvania R. Co.*, 159 F. 2d 784 (4th Cir.), Justice Parker speaking for the court stated:

> "The two barges were car floats of the defendant, approximately 350 feet in length. They were moored near together but not as close to each other or to the dock as was possible, and as a result they had drifted until they were three feet apart amidships and six to ten feet at their offshore ends. There was evidence that the guard rails surrounding them were rotten and broken in places and that they were so inadequately lighted that employees found it necessary to use flashlights in going about them on the night in question.
>
> * * * * * *
>
> The theory of plaintiff is that decedent was going from one barge to the other, when in some way, because the barges had drifted apart, because of the defective condition of the guard rails, because of the defective lighting or because of the combination of all these

things, he fell or was thrown between the barges into the water. No one saw him fall, but, when discovered, he was in the water between the barges about amidships, was calling for help and, by treading water, was managing to keep himself afloat.

* * * * * *

We think that the trial judge was in error in limiting the jury's consideration of negligence to what occurred in the attempt at rescue. While it is impossible to say with certainty what caused decedent to fall between the barges, it is a reasonable inference from the evidence that in attempting to go from one to the other he fell between them as a result of the defective lighting. There is nothing to indicate that he was shoved or pushed overboard, or that he was intoxicated, or that he was attempting to commit suicide. Under such circumstances the cause of the fall can no more be said to be speculative than in the case of a man found in the hold of a vessel beneath an unguarded hatch. See Johnson v. Griffiths S.S. Co., 9 Cir., 150 F. 2d 224. It is the duty of the vessel to provide a safe working place for members of its crew; and where there is evidence that it failed to do so and proof of circumstances from which it can reasonably be inferred that injury resulted from such failure, the case is for the jury. It is elementary that proximate cause need not be established by direct evidence but may be proven by circumstances. 38 A. Jur. 1033."

Therefore this decision of the Circuit Court of Appeals for the Second Circuit is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in the *Sadler* v. *Pennsylvania Railroad* case.

The Court of Appeals decision which sustained the court below in dismissing the case and refusing to permit the

jury to pass upon the fact questions involved is in conflict with the principles of law enunciated by this Court in the *Lavender* v. *Kurn* case, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916. The trial judge in his oral decision, stated "there is some evidence of negligence and there is an accidental death," but dismissed the case on the ground "For the jury to arrive at the conclusion of causal connection, the vehicle could not be reasonable inference but only sheer speculation." The Court of Appeals in its decision held "We have no way of knowing how or where the accident occurred, and cannot say that it was proximately caused by any default on the part of the defendant." Thus the courts, both the trial judge and the Court of Appeals, failed in considering the evidence, to comply with the doctrine of law enunciated by the U. S. Supreme Court in the *Lavender* v. *Kurn* case which held:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

On the basis of the *Lavender* case, this Court granted a Writ of Certiorari in the case of *Harsh v. Illinois Terminal Railroad Co.*, 348 U. S. 809, 75 S. Ct. 35, and then on February 14, 1955 reversed the judgment, 75 Supreme Court 362.

In the case of *Wilkerson v. McCarthy*, 336 U. S. 53, 69 S. Ct. 413 this Court in an opinion written by Justice Black stated:

> "There are some who think that recent decisions of this Court which have required submission of negligence questions to a jury make, 'for all practical purposes, a railroad an insurer of its employees.' See individual opinion of Judge Major, Griswold v. Gardner, 7 Cir., 155 F. 2d 333, 334. But see Judge Kerner's dissent from this view 155 F. 2d 333, at page 337 and Judge Lindley's dissenting opinion 155 F. 2d 333, at pages 337, 338. This assumption, that railroads are made insurers where the issue of negligence is left to the jury, is inadmissible. It rests on another assumption, this one unarticulated, that juries will invariably decide negligence questions against railroads. This is contrary to fact, as shows for illustration by other Federal Employers Liability cases * * *. Moreover this Court stated some sixty years ago when considering the proper tribunal for determining questions of negligence: 'We see no reason, so long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. East Tennessee, V. & G. R. Co., 128 U. S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478. And peremptory instructions should not be given in negligence cases 'where the facts are in dispute, and the evidence in relation to them is that from which fair

minded men may draw different inferences.' Washington & G. R. Co. v. McDade, 135 U. S. 554, 572, 10 S. Ct. 1044, 1049, 34 L. Ed. 235. Such has ever since been the established rule for trial and appellate courts. See Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67, 68, 63 S. Ct. 444, 451, 452, 87 L. Ed. 610, 143 A. L. R. 967. Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function. In rejecting a contention that juries could be expected to determine certain disputed questions on whim, this Court, speaking through Mr. Justice Holmes, said 'But it must be assumed that the constitutional tribunal does its duty, and finds facts only because they are proved.' Aikens v. State of Wisconsin, 195 U. S. 194, 206, 25 S. Ct. 3, 6, 49 L. Ed. 154.

In reaching its conclusion as to negligence, a jury is frequently called upon to consider many separate strands of circumstances, and from these circumstances to draw its ultimate conclusion on the issue of negligence. * * * For these reasons, the trial court should have submitted the case to the jury, and it was error for the Utah Supreme Court to affirm its action in taking the case from the jury.

In the same decision Justice Douglas concurring, stated:

"The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected."

The historic role of the jury in performing that function, see Jones v. East Tennessee, V. & G. R. Co., 128 U. S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478; Washington & G. R. Co. v. McDade, 135 U. S. 554, 572, 10 S. Ct.

1044, 1049, 1050, 34 L. Ed. 235; Bailey v. Central Vermont Ry., supra, is being restored in this important class of cases."

A review of the evidence set forth under the statement of the case shows ample evidence that the tugboats were unlighted and dark, that the floodlight cast light only on the portion of the vessel alongside the pier but that the other 3 vessels abreast were dark, and that the tug firemen used flashlights in order to enable them to see and in order to get from one boat to another. Dispatcher Corcoran (p. 9a) and Stetson, foreman (p. 24a) admitted using flashlights when stepping from one boat to the other. The tug firemen who were on duty that night likewise testified to the dark conditions and to using flashlights in crossing tubs (Andrei (p. 41a), Cunliffe (p. 37a), Casamento (p. 53a), Conlon (p. 60a)). There was also evidence of icy conditions (Stetson (pp. 19a, 20a, 21a), Conlon (p. 61a)). This has a bearing on the additional dangers in the winter time which necessitate a duty commensurate with the risk to provide adequate lighting to the tug foremen.

The plaintiff's case is based upon circumstantial evidence, there being no eyewitness to Schulz's death. It was conceded by defendant that Schulz did *not* meet his death by suicide, foul play or intoxication (pp. 2a, 3a). It was admitted he met his death by accident (p. 2a). The death certificate stated cause of death as drowning probably accidental. The autopsy report revealed no external marks and stated that it was death by drowning. The police report when Schulz was missing stated "last seen on Penn Tugboat Altoona docked at Pier H, Jersey City," which is the next pier to Pier H where Altoona was docked. He was clothed in his underwear with a flashlight in one of his hands (p. 27a).

His street clothes were found on the Altoona in the upper engine room where the firemen usually undress, by Stetson about 1:25 a. m. (p. 18a). The canvas bag containing his work clothes was partly opened, his dress shoes were under the clothes and the paper bag containing his lunch was unopened (pp. 28a, 29a). He was last seen alive between 7:00 and 7:15 p. m. by dispatcher Corcoran walking in the direction of the tug Altoona (p. 6a).

It is definitely established that Schulz met his death on December 25, 1949 between 7:00 p. m. when Corcoran last saw him and 1:25 a. m. when Stetson found his street clothes on the Altoona. This time element can be further narrowed. Casamento, tug fireman, went aboard the Altoona about 12:30 a. m. and found the fires were poor, the water in the boiler was low and the steam low, and was unattended to for 2, 3 or 4 hours (p. 52a). Andrei went aboard the Williamsport, 4th tug out, at 11 p. m. and noticed fires in bad shape (p. 38a) and unattended within the last 3 hours or so (p. 39a). This indicates that Schulz last tended the fires about 8 p. m., so that he met his death some time between 7 p. m. and 8 or 9 p. m. We have the date and the time established. Now the place of his death.

Schulz's street clothes were found on the Altoona and his work clothes were still in the canvas bag in the engine room. His body was found dressed in his underwear. It can be reasonably inferred that he was changing his clothes when something happened requiring him to go out on the vessel with a searchlight in his hand. The evidence is undisputed that Andrei at 11 p. m. found the injector had been on in the Williamsport (p. 38a). He so stated in his statement to the defendant taken 2 days after the accident (p. 50a). It was on about 2 hours (p. 51a). The Williamsport was the 4th boat out and abreast of the Altoona. The last person on the Williamsport previous

to Schulz was Barker, who took off all injectors when he left the boats about 5 p. m. (p. 35a). After Barker and before Andrei, the only person aboard the Williamsport could only have been Schulz. Corcoran, dispatcher, testified that Schulz was the only fireman attached to those 4 tugs during the time mentioned (p. 8a). The injector is put on and taken off manually by hand (p. 30a). It therefore appears that it can be reasonably inferred that Schulz was the only person who had put the injector on the vessel Williamsport and that it must have been put on about 9 p. m. and never taken off until Andrei arrived at 11 p. m. In order to put on the injector on the Williamsport, Schulz had to cross from the Altoona where he took off his street clothes to the Williamsport which was the 4th tug abreast. He reasonably met his death some place between the Williamsport when he put on the injector and his return to the Altoona where he was changing his clothes.

It is for the jury to infer reasonably the conditions which may have prompted Schulz to leave the Altoona in his underwear with a searchlight in his hand. Chief Engineer Pausley testified the injector is put on in cooling down the boiler when it reaches the maximum steam (p. 32a). Andrei said that when the safety valve goes off due to excessive steam it makes a loud hissing noise (p. 42a). Casamento said it makes a loud whistling noise (p. 55a).

The jury from this circumstantial evidence can reasonably infer that an emergency arose while Schulz was changing into his working clothes on the Altoona, that he hurried in his underwear with a searchlight in his hand across the four tugboats to the Williamsport, 4th tug out, and put on the injector because the boiler needed water (p. 42a), that in returning to the Altoona where he had his clothes, he fell into the water and was drowned. The jury could, in considering the darkness shown to be existing about

the tugboats and the weather conditions, with or without the presence of ice, and the hazards existing in crossing from one boat to another boat, reasonably infer that the negligence of the defendant caused or contributed to the death of Schulz by accidental drowning. The trial judge erred in not submitting the case to the jury for its determination.

It therefore appears that the Court of Appeals erred in failing to reverse the judgment below so as to restore to the jury the historic role of passing on disputed questions of fact and inferences therefrom, in conflict with the above cited decisions of this Court. Unless this Writ of Certiorari is granted and this error corrected, it will result in prejudice to the substantial rights of this plaintiff and of other persons whose cases might be decided in a similar fashion contrary to the decisions of this Court.

CONCLUSION

For the above reasons a Writ of Certiorari should be granted as prayed for.

Respectfully submitted,

NATHAN BAKER,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 282

ALMA SCHULZ, Administratrix of the Estate of August M. Schulz,

Petitioner,

—v.—

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF ON THE MERITS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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must be given a liberal interpretation. We think that it includes any knowing or careless breach of any obligation which the employer owes to the seamen. * * * "

In *Casey* v. *American Export Lines*, 173 F. 2d 324 (2 Cir. 1949) the deceased, the master of defendant's vessel, died in a fire on board. There was no evidence showing how or where the fire started. The plaintiff claimed there was a failure to have proper fire watches and failure to effectively and promptly combat the fire. A verdict for plaintiff was affirmed. Judge Swan stated among other things at page 327:

" * * * It must also be conceded that the precise moment of Capt. Casey's death is unknown and that even if the fire had been discovered promptly and if the inside firehose had been available under sufficient pressure without any delay, one cannot know with certainty that the captain's life would have been saved. * * * But almost every verdict of a jury involves the element of speculation or conjecture to some extent. * * * "

Then at page 328 he stated:

" * * * In our opinion the causal relation between the negligence and the death was a question for the jury."

In *McDonough* v. *Buckeye S.S. Co.*, 103 F. Supp. 473 (N. D. Ohio, 1951) the deceased returned in an intoxicated state from shore leave with the assistance of another seaman who was sober who left him on the dock when he fell and refused to rise. Two weeks later the body of the deceased was discovered in the river, the death having

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—v.—

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Respondent.

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Court of Appeals (R. 83, 84) is reported at 222 F. 2d 540 (2 Cir. 1955).

Jurisdiction

The judgment of the Court of Appeals was entered May 3, 1955. On August 1, 1955 the petition for a writ of certiorari was filed and was granted November 7, 1955. The jurisdiction of this court is found in 28 U. S. C. 1254(1) and 1201(c).

Questions Presented.

1. Whether the Court of Appeals in affirming the judgment of the Court below erroneously differed with the opinion of the Court of Appeals for the Fourth Circuit in the case of *Sadler* v. *Pennsylvania Railroad*, 159 F. 2d 784 (4 Cir. 1947), which held that proximate cause need not be established by direct evidence but may be proved by circumstances and which also held that it was for the jury to determine the cause of the fall from the reasonable inferences which cannot be said to be speculative.

2. Whether the Court of Appeals in affirming the judgment of the Court below erroneously deviated from the principles of law established by this Court in the case of *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946), and in failing to grant a retrial and permit the case to go to the jury to settle the dispute by choosing the most reasonable inference and that this did not involve speculation and conjecture.

3. Whether the trial court erred in refusing to admit evidence concerning the hazards of crossing from tug to tug, and in refusing to admit other circumstantial evidence.

Statutes Involved

The Jones Act, 46 U. S. C. A. 688 (1948 Ed.) provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway em-

ployees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, §20, 38 Stat. 1185; June 5, 1920, c. 250, §33, 41 Stat. 1007.

F. E. L. A., 45 U. S. C. A. §51 (1954 Ed.) provides:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.

L. H. W. C. A., 33 U. S. C. A. §902 (1950 Pocket Part) provides in pertinent part:

(1) The term "person" means individual, partnership, corporation, or association.

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

(3) The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

* * * * *

(9) The term "United States" when used in a geographical sense means the several States and Terri-

tories and the District of Columbia, including the territorial waters thereof.

* * * * * *

(11) "Death" as a basis for a right to compensation means only death resulting from an injury.

* * * * * *

(16) The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

* * * * * *

(19) The singular includes the plural and the masculine includes the feminine and neuter. Mar. 4, 1927, c. 509, § 2, 44 Stat. 1424 as amended June 25, 1938, c. 685, § 1, 52 Stat. 1164; 1946 Reorg. Plan No. 2, § 3, eff. July 16, 1946, 11 F. R. 7873, 60 Stat. 1095; 1950 Reorg. Plan No. 19, § 1, eff. May 24, 1950, 15 F. R. 3178, 64 Stat.

L. H. W. C. A., 33 U. S. C. A. 903 (1950 Pocket Part) provides:

Coverage. (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another. (Mar. 4, 1927, c. 509, §3, 44 Stat. 1426.

L. H. W. C. A., 33 U. S. C. A. §905 (1950 Pocket Part) provides:

Exclusiveness of liability. The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee. (Mar. 4, 1927, c. 509, §5, 44 Stat. 1426.)

Statement

The plaintiff is the widow of the deceased, August M. Schulz, Jr., and she sues as the administratrix of his estate. Her complaint is based on the Jones Act, Section 33 of the Merchant Marine Act of 1920, 46 U. S. C. 688 (R. 1). The defendant, in its answer to the complaint admitted that the tug boat "Altoona" was docked or moored at Pier H, Jersey City, Hudson County, State of New Jersey, a pier owned, operated, managed, and controlled by the defendant, Pennsylvania Railroad Company (R. 2, 4). It set forth as defenses (1) assumption of risk by deceased and lack of negligence by defendant, (2) sole negligence of deceased, (3) contributory negligence as a partial defense, (4) the provisions of the Longshoremen's and Harbor Workers' Compensation Act (hereinafter referred to as LHWCA for convenience and brevity) provide an exclusive remedy (R. 4, 5).

The case came on to be heard before the Honorable David N. Edelstein. At the trial it was conceded by the defense that the deceased did not commit suicide and no foul play was involved in his death. It was also conceded that the deceased was an honorable man (P8).

Mrs. Schultz testified that the last time she saw her husband alive was on Christmas Day at about 2:30 in the afternoon when he left for work. He took his lunch with him in a paper bag (R. 9). James H. Corcoran, a crew dispatcher for the defendant on December 25, 1949 testified that he had assigned the deceased to "watch" a certain number of tug boats (R. 9). He stated that the deceased had been due to start work at 5:00 p. m., that the deceased had called earlier to say he'd be late because he missed the bus or train connection, and he arrived about 5:15 p. m. (R. 10). Mr. Corcoran assigned a Mr. Barker to check

the tug boats until the deceased came in (R. 10). The deceased was given a sheet when he arrived and he went to the boats in his street clothes (R. 11). He came back to Mr. Barker's office at the outer end of Pier H (toward the water) at about 7:00 p. m. (R. 9, 11). The deceased stated he had just completed rechecking the boats and he was going in to change his clothes and go to work (R. 11). He left the office and was seen walking up the dock toward the "Altoona" (R. 12). That was the last time this witness saw the deceased. The witness was to work until 11:00 p. m. and the deceased until 1:00 p. m. (R. 12). The witness stated the deceased had appeared sober and fit for work (R. 16).

Frederick A. Stetson, another of defendant's employees who was an assistant foreman of engines, testified that at about 12:15 he went to the "Altoona" and found that her fires were practically out (R. 19). He reported this to Ernest Brenhaus who was the crew dispatcher (R. 20). The first time he went on board he didn't look for clothing. The second time he saw some street clothes hanging on the bulkhead of the engine room of the vessel (R. 21). This place was where the firemen usually undress (R. 22). He found out later that the clothes belonged to the deceased (R. 22).

Thomas L. Brennan of the Jersey City Police Department testified. He brought the Police Department records. He read various entries into evidence (R. 28).

The report stated that on January 31, 1950 at about 11:55 a. m. the body of the deceased was found floating in the water off Pier F. It also stated that when "the body was found in the water there was a flashlight in one of his hands" (R. 29). His grip with his overalls had been found on the "Altoona" (R. 39). The file of the county physician contains the notation "had flashlight in hand when taken out of water. Only underwear and shoes on" (Pl. Exh. 1).

There were no lights on the tugs (R. 13, 14, 37, 44). There was evidence establishing that it was dark on the tugs (R. 38, 48, 51). The deceased was assigned to four tugs. The other employees of the defendant who testified had been assigned to two each (R. 37, 38, 49, 55). One employee testified that a fireman wasn't actually capable of taking care of more than two tugs (R. 47). There was also evidence that it was a cold winter night (R. 24, Pl. Exh. R. 82a). The injector on the "Williamsport" had been turned on during the watch of the deceased and was found in that condition (R. 40). There are other significant details which are discussed more fully under Points I and II.

The court refused to permit plaintiff's attorney to question defendant's employees about the extent of the darkness (R. 18, 43, 53), about the danger involved in crossing from tug to tug (R. 26); about the use of a flashlight in crossing from tug to tug (R. 58); about the manner of crossing from tug to tug (R. 46, 47); about the circumstances under which it would be necessary to put an injector on and the necessity of doing so to protect the boiler (R. 51). The petitioner includes all these rulings as subsidiary questions on this appeal as the facts relating to the extent of darkness, the manner of crossing from tug to tug and the hazards involved, and the reasons for turning on injectors on tug boilers are all additional facts which would assist a jury in making its findings.

The trial judge directed a verdict on behalf of defendant stating there was no proof of causal relationship (R. 56). He explicitly refrained from ruling on respondent's defense under the LHWCA (R. 57). On appeal, his ruling was affirmed (R. 83).

Summary of Argument

In the present case there were facts from which a jury could have found:

(1) The deceased was a member of the crew of the four vessels to which he was assigned as a watch fireman.

(2) The deceased died by drowning on December 25, 1949 between 7:00 p. m. and 10:00 p. m.

(3) The deceased died while hurrying from tug to tug while in the course of his duties.

(4) The defendant was negligent in assigning him to four tugs instead of two.

(5) The defendant was negligent in not providing sufficient light.

(6) The deceased fell into the water as a result of such negligence and died of drowning.

The evidence was circumstantial in nature. Under the liberal interpretation of the Jones Act and the broad scope of the jury's function as the finders of fact, the trial court erred in directing a verdict for defendant. In addition, the court erred in excluding certain evidence. The questions of fact presented by the evidence and the inferences to be drawn therefrom should have been submitted to the jury.

POINT I

The evidence, together with the inferences arising therefrom, would have supported a verdict in favor of plaintiff so that it was error for the trial judge to direct a verdict for defendant.

The trial judge based his decision on the alleged failure to prove proximate cause. He conceded that there was some evidence of negligence (R. 56). The Court of Appeals likewise based its decision on the question of proximate cause. (R. 84).

In the case of *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946), a suit under the Federal Employers' Liability Act, 45 U. S. C. §51 (hereinafter referred to as the FELA), a judgment for plaintiff which had been set aside by the Supreme Court of Missouri was reversed by this court. The deceased had been found lying face down on the ground near the tracks. He had been struck on the back of the head. There were no known eye-witnesses to the accident. Mr. Justice Murphy reviewed all the circumstances as revealed in the evidence, and stated at page 653:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its

> conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The *Lavender* decision applies with equal force to cases under the Jones Act. *Cox* v. *Roth*, 348 U. S. 207, 75 S. Ct. 242, 99 L. Ed. 260 (1955); *Johnson* v. *United States*, 333 U. S. 46, 68 S. Ct. 391, 92 L. Ed. 468 (1948).

In *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (1949), a FELA case, Mr. Justice Black stated among other things, in reversing a directed verdict for defendant at page 63:

> "In reaching its conclusion as to negligence, a jury is frequently called upon to consider many separate strands of circumstances to draw its ultimate conclusion on the issue of negligence. * * *"

In *Stone* v. *New York C. & St. L. R. Co.*, 344 U. S. 407, 73 S. Ct. 358, 97 L. Ed. 441 (1953), a FELA case, a reversal of a verdict for plaintiff was reversed by this court. Mr. Justice Douglas at page 409 stated, among other things:

> "We think the case was peculiarly one for the jury. The standard of liability is negligence. The question is what a reasonable and prudent person would have done under the circumstances. * * * The fact that fair-minded men might likewise reach different conclusions on this branch of the case emphasizes the appropriateness of also leaving it to the jury. * * *"

In *Blair* v. *Baltimore & O. R. Co.*, 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490 (1945), a reversal of a verdict for plain-

tiff in a FELA case was reversed by this court. Mr. Justice Black stated at page 604:

> "We think there was sufficient evidence to submit to the jury the question of negligence posed by the complaint. The duty of the employer 'becomes more imperative as the risk increases.' * * * The negligence of the employer may be determined by viewing its conduct as a whole. * * * And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others."

In applying the Jones Act it has been stated that the act is to be liberally construed in aid of its beneficent purpose to give protection to seamen and those dependent on his earnings. *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 375, 53 S. Ct. 173, 77 L. Ed 368 (1932). The defendant at the trial stipulated that the deceased did not commit suicide and there was no foul play (R. 8). In addition the deceased is aided by a presumption that he used due care for his own safety. *United States* v. *Fotapulos*, 180 F. 2d 631, 637 (9 Cir. 1950); *Swetting* v. *Pennsylvania R. Co.*, 142 F. 2d 611, 612 (3 Cir. 1944); *Stark* v. *American Dredging Co.*, 66 F. Supp. 296, 301 (E. D. Penna. 1946).

In *Koehler* v. *Presque-Isle Transp. Co.*, 141 F. 2d 490 (2 Cir. 1944) cert. den. 322 U. S. 764, 64 S. Ct. 1288, 88 L. Ed. 1591 (1944), Judge Frank speaking for the court stated at page 491:

> "* * * An employer under the Jones Act is liable for 'negligence.' Jamison v. Encarnacion, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082, and Alpha S.S. Corp. v. Cain, 281 U. S. 642, 50 S. Ct. 443, 74 L. Ed. 1086, teach us that 'negligence,' as used in that statute,

been caused by drowning. The court decided the case without a jury and found for plaintiff. Among other things Judge Freed stated at page 477:

> "Defendant has taken the position that even if there was negligence, it would be conjecture and speculation to say that such acts were the proximate cause of the injuries suffered.
>
> Modern decisions display great liberality in the construction of the Jones Act and the Federal Employers' Liability Act, 45 U. S. C. A. 51 et seq., in respect of proof of negligence and causation. * * *"

In *Johnson v. Griffiths S.S. Co.*, 150 F. 2d 224 (9 Cir. 1945) a decree dismissing a libel was reversed and the case remanded for ascertainment of damages. The deceased died when he fell into a hold. No one actually saw the deceased fall. There was evidence that the defendant's vessel was anchored in an open roadstead, under blackout conditions with no lights on deck; the weather was freezing and ice and sleet were on deck; the vessel was pitching heavily; the passageway in the forepeak was obstructed with dunnage and debris, the guard on the steampipe over which the men were required to walk was loose and shaking causing limited visibility from the leaking steam. Judge Garrecht stated at page 226:

> "* * * Under these circumstances the maintenance of an open hatch with no lifeline about it constitutes negligence which is so closely related to the injury in this case as to imply the conclusion that it was the proximate cause of the death.
>
> In determining proximate cause, it is not essential that the causal connection be shown by direct evidence; the causal connection can be shown by facts and cir-

cumstances which, in the light of ordinary experience, reasonably suggests that the defendant's negligence in the manner charged operated proximately to produce the injury. 38 Am. Jur. 334.

It is reasonable to conclude that the negligence established in this case was sufficient to have been the cause of the injury, if the deceased was at the point where this negligent condition prevailed. * * *"

See also *Hanley* v. *Erie*, 273 App. Div. 257, 77 N. Y. S. 2d 153 (1948), affirmed without opinion 298 N. Y. 816; 83 N. E. 2d 861 (1949).

In *Pearce* v. *Lehigh Valley R. Co.*, 157 F. 2d 252 (3 Cir. 1948) the plaintiff was injured when he fell off a catwalk on defendant's engine which had slush and water on it. It was claimed that there was insufficient illumination. In affirming a judgment for plaintiff, Judge O'Connell stated at page 253:

"This was evidence from which the jury might properly have concluded that the defendant had been negligent in failing to supply proper lighting and that by reason of an insufficiency of the lighting equipment the plaintiff suffered his injuries. We need not speculate whether the proximate cause of plaintiff's fall might also properly—or even logically—be attributed to some factor other than the lack of illumination. The plaintiff's proof was sufficient to go to the jury on negligence and causation. * * *"

In *Sadler* v. *Pennsylvania R. Co.*, 159 F. 2d 784 (4 Cir. 1947), a judgment for defendant was reversed. The deceased was a cook on defendant's barge. Two of defendant's barges were moored near to each other. They had drifted

apart several feet. There was evidence that the guard rails surrounding the barges were rotten and broken in places and that they were so inadequately lighted that employees found it necessary to use flashlights. Judge Parker stated at page 785:

> "We think that the trial judge was in error in limiting the jury's consideration of negligence to what occurred in the attempt at rescue. While it is impossible to say with certainty what caused decedent to fall between the barges, it is a reasonable inference from the evidence that in attempting to go from one to the other he fell between them as a result of the defective lighting. There is nothing to indicate that he was shoved or pushed overboard, or that he was intoxicated, or that he was attempting to commit suicide. Under such circumstances the cause of the fall can no more be said to be speculative than in the case of a man found in the hold of a vessel beneath an unguarded hatch. See Johnson v. Griffiths S.S. Co., 9 Cir., 150 F. 2d 224. It is the duty of the vessel to provide a safe working place for members of its crew; and where there is evidence that it failed to do so and proof of circumstances from which it can reasonably be inferred that injury resulted from such failure, the case is for the jury. It is elementary that proximate cause need not be established by direct evidence but may be proven by circumstances. 38 Am. Jur. 1033. We think that the evidence of negligence with respect to the lighting of the barges is sufficient to take the case to the jury, but not the evidence as to mooring or as to the condition of the guard rails."

In *Bribazon v. Belships Co.*, 202 F. 2d 904 (3 Cir 1953) the plaintiff, a longshoreman, was injured when he fell in

the hold of a vessel, a decree for libelant was affirmed. Judge Hastie stated at page 909:

> "The record makes it abundantly clear that the single light cluster used by a gang did not and could not illuminate more than the small area where a particular lashing was being accomplished. The fixture had to be low and so directed as to provide clear illumination for the immediate operation. Thus, the cluster for Brabazon's gang was placed between forward and aft tenders on the port side of each row and directed to port as well as downward, so the workmen could see the entire lashing cable being attached at one end to a port side tender and at the other end to permanent structures of the hull on port side. This cluster cast no useful light to starboard. In addition, there was evidence that shadows of tenders would severely limit the effective range of individual lights and create a special lighting problem as men moved about between these vehicles. Yet, except for these lights for individual gangs, no illumination was supplied for any area but the access ladder from the deck. There was no provision for lights which could be placed to illuminate other areas of likely movement. And the record shows that men doing this type of work required tools and lumber which were scattered about the hold.
>
> . . . . . .
>
> Finally, it is clear on the record that the inadequacy of the board which broke to support a man's weight would have been apparent but for the darkness. Light would have made the danger obvious and would have enabled the workman to avoid it."

In *Armit* v. *Lovejoy*, 115 F. 2d 208 (3 Cir. 1940), a judgment for plaintiff was affirmed. The plaintiff was a chief

engineer on defendant's vessel. He slipped and fell on oil on the treads of a ladder. There was evidence that the light in the engine room was "not very good." Had splash plates been used near the engine the oil would not have been thrown on the ladder. Judge Jones stated at page 311:

> " * * * Consequently, negligence is the basis of an injured seaman's action for damages under the Jones Act. 35 Stat. 65, 45 U. S. C. A. 51; Jamison v. Encarnacion, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082. While negligence has been variously defined, it has lately been authoritatively redefined as being 'any conduct, except conduct recklessly disregardful of the interest of others, which falls below the standard established by law for the protection of others against unreasonable risk of harm.' Restatement of the Law, Torts, 282. A standard of conduct established by law with respect to employers of seamen is that they shall provide their employees with a safe place in which to work. * * * "

The United States Court of Appeals in affirming the decision below cited *Johnson* v. *Palmer*, 220 F. 2d 279 (2 Cir. 1955) (R. 84). This opinion in turn incorporated and affirmed that of the trial judge. The deceased was a "float man" employed on defendant's tugboat. He died by drowning while his tug was removing two empty carfloats. There were no eyewitnesses to his death. The alleged evidence of negligence concerned signals and observations which had to be made before floats were moved. The court held that since there was no evidence that the deceased fell overboard when the signals and observations were supposed to have been made there was a failure of proof as to causal relationship. The opinion of the District Court is in *Johnson* v. *Palmer*, 129 F. Supp. 202 (E. D. N. Y., 1953). In the pres-

ent case the negligent acts complained of were continuing ones which existed at all times when the circumstances indicate the deceased went overboard.

In *Boston & M. R. R. v. Cibaina*, 148 F. 2d 150 (1 Cir. 1945), cert. den. 325 U. S. 873; 65 S. Ct. 1414, 89 L. Ed. 1991 (1945), the plaintiff was injured in defendant's roundhouse when struck by a backing locomotive. There was testimony showing that the lighting was dim. A judgment for plaintiff was affirmed. Judge Mahoney stated at page 151:

> "* * * The backward movement of cars on a dark night in an unlit yard was potentially perilous to those compelled to work in the yard. * * *"

It would have been a simple matter for the defendant to have had more adequate lighting in the area of the four tugs. The risks in going from tug to tug with merely the benefit of a flashlight on a dark, cold night is obvious. In *Kangadis v. United States*, 121 F. Supp. 842 (S. D. N. Y. 1954) Judge Goddard stated at page 844:

> "* * * Consequently, to require a seaman to do his work in a dangerous manner, when there are other and safe ways to do it is negligent. * * *"

See also *Gold v. Groves*, 182 F. 2d 767 (3 Cir. 1950) which deals with the insufficiency of help to do assigned work.

There was evidence which would have justified a jury finding that the deceased was not provided with a safe place to work.

The deceased was last seen at about 7:00 p. m. (R. 12). The deceased was supposed to work until 1:00 a. m. (R. 12). There were no lights on the four tugs to which the deceased was assigned (R. 13, 14, 37, 41). The firemen who were as-

signal to the boats had to use flashlights because it was dark on the boats (R. 12). Lights would enable the men to see better, to check the water better, and to get from one boat to the other better (R. 14). The deceased was found with a flashlight in one of his hands (R. 29). One witness, who went to the tugs a little after 11:00 p. m., testified that the tugs were dark (R. 41) and he used either a flashlight or lantern (R. 42). He testified that the floodlights which were on the pier failed to light up the tugs which were not adjacent to the pier (R. 48). Another witness testified that the "Altoona" was dark and that the floodlights on the pier only lighted the part of the "Altoona" nearest the pier and the other part was dark (R. 51).

The floodlights on the pier were on top of the dispatcher's office and had two distinct beams or cone-shaped lights (R. 55). It would only help to light any tug alongside the pier (R. 55). The other tugs were dark. The "Altoona" and the other tugs were "up the dock" (R. 12).

It was practically undisputed that the tugs which were not tied adjacent to the pier were dark and that the one nearest the pier has the benefit of the floodlights only to a limited extent. No purpose was served in not supplying more light except to save the defendant the cost of some additional light bills.

The attorney for plaintiff asked a series of questions concerning the method of crossing from one tug to another and the advantages and disadvantages of crossing from one tug to another with a flashlight (R. 16, 17, 18, 26, 38, 45, 46, 47, 53, 54). This testimony was excluded by the court. At one point the court stated (R. 17):

> "The Court: Objection sustained. There has been no testimony that he crossed from one tug to another."

At another point the court stated (R. 46):

> "The Court: After reflection, please note my change in ruling as to Mr. Baker's being permitted to adduce testimony from the witness Andrei as to how he crosses from one tug to another and as to that no testimony will be permitted, and the objection of the defendant is sustained."

The court erred in preventing plaintiff from developing the evidence relating to the means of crossing from one tug to another. When the deceased's body was finally found it was nearby to the area where the tugs were located. The tugs had been tied to Pier H. The body was found off Pier F (R. 28). When last seen he was going in the direction of the tugs to which he was assigned (R. 12). His absence was noted about 12:15 a. m. (R. 19). His street clothes were still on the "Altoona" (R. 21). His overalls were still on the tug also (R. 30). When found in the water the deceased still had a flashlight in his hand (R. 29). He died of drowning.

The fact that on a winter night both the working clothes and the street clothes of the deceased were left on the tug and he was found in his underwear leaves only one probable inference, *i.e.*, that he was still on board the Altoona or one of the other tugs when he fell into the water. Only an emergency connected with his employment would cause a sober, responsible man to leave an engine room where he was changing clothing to run out, flashlight in hand. Furthermore, he would not normally go about in a state of undress on the pier or elsewhere.

There was no evidence that the vessels pitched or moved or that anything happened which would have caused the deceased to be thrown off one of the tugs. The most logical inference to be drawn from the established facts was that

the deceased fell into the water while crossing from the [illegible] to tug in the darkness.

There were additional facts which help establish the sequence of events that evening. The deceased had checked the four tugs and had reported back about 7:00 p. m. (R. 11). He was due to make his next report at 1:00 a. m. (R. 12). His duties were more fully described by one witness (R. 24).

> "A. The duties of a watch fireman like that assigned to watch boats, he goes aboard the boats and the first thing he does is attend to the water in the boiler. If you don't have water there, you will have a burned boiler. Then he goes downstairs and looks at the fires. If the fires need (fol. 29) tending, he tends to them. If the steam is low, he will raise the steam—75 to 100 pounds of steam. He can use the injector; he can use it to pump the water out of the bilges.
>
> Then he checks on the tank to see it is full. Those are his duties. He can fix those fires up and the Scotch boiler, which is a three-fire Scotch; those fires can be fixed up where you don't have to touch them for two or three hours. That is the reason they gave them two or three boats to watch. If he has a boat next to him with a diesel, he would have to take more care of that boiler, because he was taking steam off there to keep the diesel warm. That would be his duties."

At about 5:00 p. m. before the deceased came on duty another fireman had "checked" these tugs. He had pumped the boilers up with water, put coal on the fires, and pumped the bilges (R. 35). The fires would have kept up normally for two to two and a half hours (R. 36). After he had loaded the boilers with water, he had shut off the injectors and valves on all three steamboats (R. 36). This had been done between 5:00 and 5:30 p. m. (R. 37). At about 11:00 p. m. another fireman who was then assigned to two of the

four boats to which the deceased had been assigned, noticed that the "Princeton" and "Williamsport" were both in "poor shape" and that the injector was open on the "Williamsport." He stated that usually before a fireman leaves a boat he throws coal over the fire and they are "blacked out" with coal, but at this time they were all red coals. It appeared as if the fires had not been attended to for about three hours (R. 39). The fact that the injector had been turned on indicated that the boiler had needed water and someone had put the injector on to put water into the boiler (R. 42). The injector is operated by hand (R. 41).

Another fireman who was assigned to two tugs including the "Altoona" came on duty at about 12:30 a. m. (R. 49). He found that there "wasn't much fire" on the "Altoona" and that the water and steam were "low" (R. 50). He estimated that the fires had been unattended between two to four hours (R. 50).

At about 12:15 a. m. the assistant foreman of engines went to look at the fires on the tugs the deceased had attended and found they were "practically out" (R. 19). The fires on the "Altoona" were "practically out" (R. 19).

These facts all establish as a matter of reasonable probability that the deceased fell into the water between 7:00 p. m. and 10:00 p. m. They also establish that deceased interrupted the completion of duties on his tugs. The fact that he fell into the water before he had completed changing his clothes indicates that this occurred in the early part of his watch, particularly when taken in conjunction with the condition of the fires on the tugs as found later on.

Harold F. Cunliffe testified that he had been assigned to two tugs in another tier during the same period the deceased was assigned to four (R. 37). He testified all the tugs were dark (R. 38). Another witness, Charles H. Andrei, testified that he was assigned from 11:00 p. m.

to 7:00 p. m. to only two of the four boats to which the deceased had been assigned (R. 38). He testified that the tugs were unlighted and were dark (R. 41). This witness also testified that nobody "was actually capable of taking care of more than two tugs" (R. 47). Bernard P. Casamento, who worked that night also testified that he was assigned to two tugs of the four to which the deceased had been assigned (R. 49). James H. Corcoran also testified that he had been assigned to two tugs that night (R. 50).

The U. S. Department of Commerce monthly meteorological summary gave some information relative to weather conditions (Pl. Exh. 12, R. 82A). The hourly temperature chart shows that it was 32 F. at 1:00 a. m. on December 25th; that it varied slightly until 8:00 a. m. when it became slightly warmer until 11:00 p. m. it was up to 41 F. One of the witnesses, who was a tug fireman, and who started to work at midnight stated that he observed ice on the four tugs (R. 56). The only place he specifically recalled seeing the ice was on "the front bumping mat" (R. 79). These mats were located on the bow in front of the tug (R. 80). One witness, Frederick A. Stetson, was an assistant foreman of engines at the time of the accident. He was on the boats at about 12:45 a. m. (R. 39). He varied his testimony from that given in a deposition which he signed on April 27, 1951 (R. 23). He said that the condition of the weather on the night of the accident was about 10° F. (R. 24). He testified that he said in his deposition that the decks of the tugs are washed down every night by the crews when they tie up (R. 22). He denied at the trial that they would do this in the wintertime "because they would have ice all over the thing" (R. 22).

The deceased was found with a flashlight in his hand. Whether he used it at the time prior to his death we do not know although we must presume he exercised due care for

his own safety. The usefulness of a flashlight is limited where a person is crossing tugs which have a certain amount of instability and motion even in the still water next to a pier. The person using the flashlight can only see a limited area if using it while crossing over the sides of the tugs. These tugs do not have sides which tie up flush against each other (see Deft. Exh. E). There is some space and some play between these tugs. The trial court, as discussed before, refused to permit testimony concerning the manner of crossing from tug to tug on the ground that there was no evidence that the deceased fell into the water while crossing from tug to tug. This evidence would have buttressed the finding that the lighting conditions on these tugs created foreseeable danger to deceased. The inference that the insufficiency of light caused or contributed to the deceased's fall into the water is logical and consistent with all the evidence.

Furthermore, there was evidence that a man could normally take care of only two tugs at a time. The deceased was assigned to four. All other of defendant's employees who testified had been assigned to only two tugs that night. If the deceased had been assigned to two tugs he would have had to cross from tug to tug less frequently; he would have had more time to check his tugs and keep them in proper working order; there would have been less likelihood of an emergency developing on one of the tugs because of insufficient water or steam, etc. This factor contributed to the death of the deceased.

There was some evidence relating to ice, but since there was no proof that this condition did exist all over the tugs, or at least along the side of the tug where the deceased usually crossed, this evidence, by itself, cannot be causally related to the death of deceased. However the weather conditions, taken in connection with the fact that the deceased was found in his underwear do permit

certain inferences to be made concerning the things which the deceased was doing at the time of his death. (See R. 44, 45, 46.)

The deceased obviously was not strolling on deck to get a breath of fresh air in his underwear at the time he fell into the water. The cold waterfront on a December night is hardly the place to tarry without proper covering. Under the circumstances a jury might infer that the deceased made his passage from vessel to vessel with some dispatch. The "Altoona" was nearest the dock (R. 35). The outermost tug was the "Williamsport" (R. 35). The deceased's clothes were on the "Altoona" (R. 29). The injector had been left on the "Williamsport" (R. 40). These injectors are operated manually by the tug fireman, and are left on either for a short period of time or an hour or two hours. They are used to fill the boilers with the proper amount of water. Since the deceased had turned on the injector, but had never turned it off it is reasonable to infer that he was in the process of returning from the "Williamsport" where he went because of an emergency and was returning to the "Altoona" across the decks of the other two tugs where his clothing was located when he fell into the water. One can well picture the shivering figure of the deceased as he ran and jumped in the cold darkness, flashlight in hand, from tug to tug. A misjudgment in the darkness and shadows; he fails to board a side, and sinks into the waters of the Hudson River.

In the light of the decisions, discussed above, there was evidence both of negligence and causal relationship.

POINT II

A jury could have found from the evidence that the deceased was covered by the provisions of the Jones Act.

The trial judge specifically refrained from ruling on the issue relating to the applicability of the Longshoremen's and Harbor Workers' Compensation Act to the present case, but based his decision on the alleged failure of proof of proximate cause (R. 57). The Circuit Court of Appeals did not discuss the issue either, but rather decided the issue solely as one of proximate cause (R. 84).

The facts concerning the employment of the deceased were not disputed. The deceased was an "extra fireman." He would be dispatched to whichever tug or tugs might need a fireman. He didn't work on the same tug or tugs all the time. Sometimes he would be assigned to tugs which went out and sometimes to tugs which were tied up (R. 13). On the night of December 25, 1949, the deceased was the only "fireman" assigned to four of defendant's tugs (R. 14). These tugs operated the day before and worked the day after (R. 15). They were tied up temporarily for the purpose of being used in navigation again (R. 16). The deceased had the duty to take care of the boilers properly, to see that the fires were there, to see the amount of steam in the boilers, etc. (R. 19, 25), it was necessary to tend these fires so that the vessels could go out (R. 19). The boilers were tended so that they would be "near a head of steam when the crew reported to take the tug into service in the morning" (R. 21). The deceased was assigned to work by a "crew dispatcher" (R. 25). The deceased changed his clothes on the tug "Altoona" in the room where firemen usually change clothes (R. 30). A watch fireman on a tug tied up has essentially the same duties

as a fireman on a tug in running operation (R. 32). The qualifications for the jobs are the same (R. 33). The defendant assigned men to vessels according to seniority (R. 33).

From the foregoing it appears that the job classification of the deceased "fireman" is one traditionally assigned to a member of the crew of a vessel whose duties relate to the maintenance of motive power on the vessel, and the duties which the deceased performed with reference to each of the four vessels he "watched" as a fireman were duties traditionally performed by members of the crews of such vessels.

Taking the meaning of the word "crew" in the context of defendant's operations, it is quite reasonable to find that the decedent was a member of the crew of all four vessels he attended. Suppose one fireman who was regularly assigned to each tug stayed to watch that tug alone each night. Certainly he would not be regarded as other than a "member of the crew." Suppose for convenience one fireman, regularly assigned to a tug, stood watch for the firemen of three other tugs, and was injured while checking a fire on another tug. Suppose, as is the case here, a defendant operates a fleet of tugs and keeps a crew list and assigns men to one or more tugs as they find necessary to perform duties usually performed by seamen to aid these vessels in navigation. In such a situation, it makes no difference practically whether a man is officially designated a crew member of vessel A, B, C, or D. He is a crew member of each vessel for which he performs some service.

The question of whether or not the deceased was a member of the crew of a vessel was one for the jury to determine in view of the circumstances. In *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251; 60 S. Ct. 544, 84 L. Ed. 738 (1940) Chief Justice Hughes stated at page 256:

"Petitioners urge that the question whether decedent was a member of a 'crew' was a question of law. That is, that upon the undisputed facts the decedent must be held as a matter of law to have been a member of a 'crew' as distinguished from a longshoreman or laborer at work upon a vessel. We are unable so to conclude.

"The word 'crew' does not have an absolutely unvarying legal significance. * * *

* * * * * * *

* * * Even if it could be said that the evidence permitted conflicting inferences, we think that there was enough to sustain the deputy commissioner's findings."

In *Texas Company v. Gianfala*, 222 F. 2d 382 (5 Cir. 1955) the deceased was working on board defendant's drilling barge at the time of his accident. The trial judge refused to direct a verdict for defendant on the ground that the deceased was not a seaman and member of the crew as a matter of law. A verdict for plaintiff was rendered. On appeal to the United States Court of Appeals, Fifth Circuit, the judgment was reversed on the ground that as a matter of law, the deceased was not a member of the ship's crew. This decision was reversed *per curiam* and the original judgment reinstated in *Gianfala v. Texas Company*, __ U. S. __, 76 S. Ct. 141; __ L. Ed. __ (1955).

This court cited the *Barrett* case supra; *Walker v. Mississippi River Steel & Grain Co.*, 202 F. 2d 383 (6 Cir. 1953), cert. den. 346 U. S. 817, 74 S. Ct. 29, 98 L. Ed. 344 (1953); *Samuelsen v. Mississippi Shipping Co.*, 199 F. 2d 715 (4 Cir. 1952); and *Gulfstream Canal Co. v. Tenace*, 165 F. 2d 301 (1 Cir. 1948).

In addition to the above cases see also on the issue of "member of a crew" as a question of fact, *Bouchie v. Shamrock Towing Co.*, 139 F. 2d 674, 676 (2 Cir. 1943); *Schaad v. American Dredging Co.*, 138 F. 2d 534, 537 (3 Cir. 1943).

There can be little question that a "fireman" may be covered by the Jones Act, 46 U. S. C. A. 688 (hereinafter referred to merely as the Jones Act). See *Samanchin v. Massman Const. Co.*, 199 F. 2d 715 (4 Cir. 1952); *Pillard v. Seas Shipping Co.*, 146 F. 2d 875 (2 Cir. 1945); *The Emmy*, 55 F. Supp. 60 (S. D. N. Y. 1944).

In *Perry v. U. S. Employees' Compensation Commission*, 27 F. 2d 144 (N. D., Cal. 1928), the decedent was the master of one tugboat. His vessel and another vessel of his employer were anchored for the night. He went to the other vessel in the morning to start its engine. An explosion occurred on the other vessel killing decedent. The deputy commission found that the decedent was not covered by the LHWCA at the time of his death. In affirming, the district court stated at page 145:

> "* * * It appears, however, that the vessel upon which he was master belonged to the owner of the vessel upon which he was killed, and that his acts aboard the Ellen were connected directly with the navigation of the Ellen. Perry and Lorentzen had virtually exchanged duties pro tem. * * *."

In *Long Island R. Co. v. Lowe*, 50 F. Supp. 944 (E. D. 1943), the decedent had been assigned as a mate to a tug used to tow and transfer carfloats in the harbor. He performed various deck duties on the tug and when floats were being docked he stood on the bow of the float to signal the captain of the tug and handle the lines of the float. The deputy commissioner had concluded that the deceased was

not the member of the crew of any vessel when he was killed when handling lines on a float and falling overboard. Judge Inch, reversing, stated at page 945:

"The explanation for the conclusion reached by the long experienced Deputy Commissioner is found in his other findings which are in substance that Gallagher had not worked in the employment in which he was working at the time of his death for substantially the whole of the year immediately preceding same; that he had previously been employed in various capacities incidental to the transfer of freight in and about the harbor of New York. That during this period he had worked principally aboard the employer's tugs and carfloats, that he had no permanent assignments to any vessel and had been assigned as floatman, bridgeman, deckhand, aboard tugs as mate, that he lived ashore, was not furnished meals aboard vessel, was paid by the day, was not required to have a license of any kind. That none of the vessels upon which he was employed operated outside the limits of New York harbor.

The captain of the tug was a witness before the Deputy Commissioner and testified that Gallagher was a member of the crew of the tug on the day in question and described his duties as mate. That these duties were, among other things, when preparing to dock a float to stand on the bow of the float, handle the lines and give signals to the captain. That he could on request of the captain and did pilot the tug when the captain was present. That Gallagher had worked in this way on the tug about a week prior to his death. That the tug had three crews, each consisting of seven men, a captain, first mate, floatman, engineer, oiler and a fireman. That Gallagher was borne on less an

extra man because that was an extra crew, but for the week Gallagher was working on the tug and at the time of his death he was first mate.

. . . . .

It seems to me however, that this conclusion overlooks Gallagher's expressly and properly found participation, as a part of his duty, in the actual navigation of the tug. That this part of his duty, so performed, seems to me to make the position of the Deputy Commissioner untenable as a matter of law.

In *Lukos v. Chesapeake & O. Ry. Co.*, 120 F. Supp. 296 (W. D. Mich. 1954) the question of whether the plaintiff was entitled to sue under the Jones Act was determined as a preliminary matter by the trial judge. It was stipulated that the plaintiff was part of a "marine labor gang" employed in general cleaning work on defendant's vessels. The "gang" worked on vessels under way, moored to piers or completely removed from service. They worked a straight 40 hour week from 7:30 a. m. to 4:30 p. m. Monday through Friday. They ate and slept on board. They were paid on a separate payroll from that of ship's personnel. The plaintiff worked on 5 vessels from April to October of 1950. While on board one of defendant's steamers which was in navigation the plaintiff was injured. In holding that the Jones Act did apply, Judge Starr stated at page 300:

> "It has generally been held that navigation is not limited to 'putting over the helm' and that 'members of the crew' are not confined to those who 'hand, reef, and steer.' Therefore, it seems clear that the type of work performed by plaintiff and other marine laborers on the defendant's vessels was such as has traditionally been done by seamen and members of the crew and can properly be considered in aid of navigation. See

> Norton v. Warner Co., 321 U. S. 565, 64 S. Ct. 747, 88 L. Ed. 931, "The fact that plaintiff and other marine laborers did not remain on board ship during week-ends, or that they were on a separate payroll, or that their hours were different from those of other vessel personnel, will not bar plaintiff from classification as a seaman-member of the crew."

A ship is in navigation, although docked, if it remains in readiness for another voyage. *Carambey v. Cape Cod S.S. Co.*, 123 F. 2d 991 (1 Cir. 1941). The tugs which the decedent was serving were all docked temporarily. They were working tugs and the only reason they were docked was because they were not working that night. They were, however, kept in readiness for work the next day. There was direct testimony that the decedent was not a watchman in the ordinary sense but was a 'watch fireman' whose duties concerned keeping the fires of the vessels going so that the vessels could operate the next morning. The tending of fires on a vessel, etc., whether at sea or at anchor, are duties traditionally performed by members of the crew of a vessel and undoubtedly concern the navigation of the vessel. Because of the manner in which the defendant operated its tugs and assigned crew members to perform joint duties it is clear that the decedent had a permanent connection with the defendant's fleet of vessels and a specific connection with every vessel of which he served. Under those circumstances a jury could have determined he was a member of the crew of all the vessels he served and hence was covered by the Jones Act. Although the court did not specifically rule on the question as a matter of law, the issue is one which is [illegible] plaintiff's cause of action under the Jones Act is discussed here.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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On the Brief.

January 31, 1956.

Statement of the Case

This action was brought pursuant to the Jones Act (46 U. S. C. A. §688 et seq.) to recover damages sustained as the result of the death of plaintiff's intestate allegedly through the negligence of the defendant. The defendant entered a general denial in answer to the allegations of negligence and in addition to an affirmative partial defense of contributory negligence alleged as a complete defense that the plaintiff's sole remedy was that provided by the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. §901 et seq.). The applicability of the latter Act to the case at bar was never determined since the Court directed a verdict in favor of the defendant on the ground that there was no evidence to causally connect the alleged negligence of the defendant with the decedent's death.

On December 25, 1949, the decedent was employed as a "watch-fireman" by the defendant and assigned to watch four of defendant's tugboats then moored abreast of Pier H on the Hudson River in Jersey City, N. J. (p. 4a).*

The boats to which the decedent was assigned were in the third tier of boats from the outboard end of the dock (p. 2A). At that time these tugs were not in navigation (p. 3A). There was no crew or captain aboard (p. 8a); no logs were kept (p. 4A); and no navigation lights were shown (p. 12A). The decedent was the sole person assigned to these ships (p. 8a). He slept ashore (p. 3A); worked an eight hour tour (p. 7a); checked in and out of the job

*References to Plaintiff-Appellant's Appendix are designated by "a". References to Defendant-Appellee's Appendix are designated by "A"

No. 282

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

ALMA SCHULZ, Administratrix of the Estate of August M. Schulz,

Petitioner,

—*against*—

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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In the

Supreme Court of the United States

October Term, 1955

Alma Schulz, administratrix of the Estate of August M. Schulz,

Petitioner,

—against—

The Pennsylvania Railroad Company,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

Statutes Involved

In addition to the statutes set forth in the petition (pp. 2 and 3), the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 903 et seq. is also involved.

33 U. S. C. A. Section 903. *Coverage.* (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable water of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net, or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another. (Mar. 4, 1927, c. 509, § 3, 44 Stat. 1426.)

33 U. S. C. A. Section 905. *Exclusiveness of liability.* The liability of an employer prescribed in section 904 of this chapter, shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee. (Mar. 4, 1927, c. 509, § 5, 44 Stat. 1426.)

at the office or the dock (p. 3A); and locker and cafeteria facilities available ashore (p. 5A and p. 47A).

It was stipulated that the tugs Altoona, Princeton, Fort Wayne and Williamsport all exceeded [illegible] tons; that The Pennsylvania Railroad Company has secured payment for compensation as provided for in the Longshoremen's and Harbor Workers' Compensation Act; that The Pennsylvania Railroad Company has employees engaged in marine or maritime activities; and that the Hudson River is a navigable stream of the United States (p. 26A). The testimony substantiates the fact that the decedent's duties affected the interstate commerce aspects of the defendant's railroad business.

In essence the duties of a "watch-fireman" are comparable to that of a caretaker or watchman. It was the decedent's job to protect these four boats which were then tied up at the Pier by maintaining fires; keeping steam in the boilers; and in general protecting the property of the defendant (pp. 14a and 15a).

On December 25, 1949 at approximately 4:00 P. M. the decedent called his immediate supervisor, the witness James H. Corcoran, and advised him that he would be late for work (p. 4a). Mr. Corcoran advised the decedent to report anyway since there were no extra men available and the decedent's absence would leave the "middle trick", to which he had been assigned, short (p. 5a). Pending the arrival of the decedent, Mr. Corcoran assigned another watch-fireman, the witness Barker, to check the four boats to which the decedent would be assigned (p. 5a). At approximately 5:00 P. M. Mr. Barker, in accordance with his instructions, went aboard these four boats, checked the equipment and put coal on the fires of the three coal-burning tugs. He then reported back to the office (p. 33a).

The decedent reported in at approximately 5:30 P. M. After some preliminary conversations with Messrs. Corcoran and Barker, he apparently went on board the four boats to which he had been assigned and made a quick check-up of their conditions. He then reported back to Mr. Corcoran that he had checked his boats and that he was then going to change his clothes and go to work (p. 6a). The decedent was last seen walking down Pier H in the direction of the third tier in which his boats were moored (p. 6a). He was never seen alive again by anyone. On January 31, 1950 his body was found floating in the water, clad in shoes, socks and underwear, and clutching a flashlight in one hand (pp. 26a and 27a).

There is no evidence as to how, when or where the decedent met his death. At the conclusion of the trial the court granted the defendant's motion for a directed verdict on the grounds that there was a complete absence of proof which would establish that the death of the decedent was contributed to in whole or in part by negligence on the part of the defendant (p. 62a).

POINT I

THE PETITION SHOULD BE DENIED FOR THE REASON THAT THE QUESTIONS ALLEGED TO BE PRESENTED ARE NOT INVOLVED IN THIS CAUSE.

The first question stated in the Petition (Petition p. 2) is whether the Court of Appeals in the case at bar erroneously differed with the opinion of the Court of Appeals for the 4th Circuit in the case of *Sadler* v. *Pennsylvania Railroad*, 159 F. 2d 784 (C. A. 4th Cir.) which held that

proximate cause need not be established by direct evidence but may be proved by circumstances.

The question is not involved in this case.

The Trial Court (p. 62a) and the Court of Appeals for the 2nd Circuit (30a, 31a) both specifically held that there was no evidence, either direct or circumstantial, which could causally connect any negligence on the part of the respondent with the death of petitioner's intestate.

Neither the Trial Court nor the Court of Appeals for the 2nd Circuit indicated in any way that a causal relationship between negligence and death could not be established by circumstantial evidence. Both courts held that in the absence of any evidence on this point a defendant in an action under the Jones Act (48 USCA 3688 *et seq.*) is entitled to a directed verdict.

Sadler v. *Pennsylvania Railroad*, *supra*, p. 5, is clearly distinguishable from the case at bar on its own peculiar facts since in the *Sadler* case, *supra*, p. 5, the plaintiff's decedent was found treading water between two barges at a point near a broken guard rail on the barge on which the decedent had been working. At the point near the broken rail there was admittedly no illumination. Hence, it was a reasonable inference that the lack of illumination at that point contributed to the decedent's fall through the guard rail. In the case at bar there is no evidence as to how or where the accident occurred and it is impossible to say that the decedent's demise was proximately caused by any default on the part of the defendant.

The second question presented in the Petition (Petition p. 2) is whether or not the Court of Appeals in the case at bar erroneously deviated from the principle of law established by this court in the case of *Lavender* v. *Kurn*, 327 U. S. 645.

This question is not involved in this case either.

In *Lavender v. Kurn, supra*, there was an evidentiary basis for the jury to conclude that the negligence of the defendant proximately caused the death of the plaintiff's decedent. Neither the Trial Court nor the Court of Appeals in the case at bar have determined that, if there is an evidentiary basis for a jury verdict, a case can be taken away from the jury. In the case at bar both the Trial Court and the Court of Appeals determined that there was no evidentiary basis upon which a jury could reasonably conclude that the alleged negligence of the defendant was causally related to the death of the decedent. In *Lavender v. Kurn supra*, this court recognized that, for a plaintiff to succeed in the type of action presented in the case at bar it must be established that some negligence on the part of the defendant contributed to or caused the death or injuries of the plaintiff. In the case at bar there is no evidence, direct or circumstantial, that any negligence on the part of the defendant contributed to or caused the death of the plaintiff's intestate.

The case at bar presents no general principle, no important federal question, and no conflict between courts for review. Only the application of well-settled rules to particular facts is involved.

CONCLUSION

THE PETITION FOR THE WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

JOSEPH P. ALLEN,
Attorney for Respondent.

In the

Supreme Court of the United States

October Term, 1955.

No. 282

Alma Schultz, Administratrix of the Estate of August M. Schultz,

Petitioner,

v.

The Pennsylvania Railroad Company,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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The decision of the Court of Appeals in the case at bar is not in conflict with any decision of the Court of Appeals for the Fourth Circuit and does not deviate from any principles enunciated by this Court. In this action there is a complete lack of probative facts which would support a conclusion that any negligence by the respondent contributed in whole or in part to the accidental death of the decedent	8
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IN THE

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OCTOBER TERM, 1955

No. 282

ALMA SCHULZ, Administratrix of the Estate of August M. Schulz,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Questions Presented

The questions originally presented in the petitioner's petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit were as follows:

"1. Whether the Court of Appeals in affirming the judgment of the Court below erroneously differed with the opinon of the Court of Appeals for the Fourth Circuit in the case of *Sadler* v. *Pennsylvania Railroad*, 159 F. 2d 784 (4 Cir. 1947), which held that proximate cause need not be established by direct evidence but may be proved by circumstances and which also held that it was for the jury to determine the cause of the fall from

the reasonable inferences which cannot be said to be speculative.

2. Whether the Court of Appeals in affirming the judgment of the Court below erroneously deviated from the principles of law established by this Court in the case of *Lavender* v. *Kurn*, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946), and in failing to grant a retrial and permit the case to go to the jury to settle the dispute by choosing the most reasonable inference and that this did not involve speculation and conjecture."

In the petitioner's brief on the merits a third question has been added:

"3. Whether the trial court erred in refusing to admit evidence concerning the hazards of crossing from tug to tug, and in refusing to admit other circumstantial evidence."

The respondent views the sole question presented as whether or not there is any evidentiary basis presented by the record from which a reasonable inference could be drawn that any negligence by the respondent contributed in whole or in part to the death of the decedent.

Statement

This action was brought pursuant to Section 33 of the Merchant Marine Act of 1920, popularly known as the Jones Act, (46 U.S.C., 688 et seq.) to recover damages for the wrongful death of petitioner's intestate husband allegedly caused by the negligence of the respondent.

The decedent was a 36 year old employee of the respondent. On December 25, 1949 he was assigned as a "watch fireman" on four of respondent's tug boats (R. 9) which were then moored abreast of each other alongside the south

side of Pier H on the Hudson River in Jersey City, New Jersey (R. 35). At the outer end of the pier which is approximately 600 feet long (R. 62), is a two story building which houses a crew dispatcher's office (R. 59 and R. 66). On top of the building are two huge flood lights each equipped with a 500 watt lamp with reflectors projecting light down on to the pier and its environs (R. 66). Six other flood lights also project light towards the pier from a point about 150 to 200 feet inland from the bulkhead of the pier (R. 63). These lights illuminate the entire pier and at least part of the boats moored alongside (R. 51, 55, 59, 62, 63, 65, 66, 67, 69, 74, 75, 78 and 79). The tugs which are approximately 96 feet to 100 feet long (R. 63) were moored abreast of the pier in tiers (R. 35). The four boats to which the decedent was assigned, the "Altoona", the "Fort Wayne", the "Princeton" and the "Williamsport", were in the third tier of boats from the outer end of Pier H (R. 59), approximately 275 feet to 300 feet towards shore from the building upon which the flood lights were located, (R. 59).

The "Altoona" lay alongside the dock, and the "Princeton", the "Fort Wayne" and the "Williamsport" were outboard of the "Altoona" in that order (R. 35). These four tugs had been tied up on the morning of December 24, 1949 and were not scheduled to work again until the morning of December 26, 1949, (R. 15, and 16). The decedent was the sole person assigned to watch these tugs during his tour of duty (R. 14) which was from 5 P.M., December 25, 1949 until 1 A.M., December 26, 1949 (R. 10, R. 12). On the night in question the tugs had been temporarily removed from navigation (R. 59); there was no crew or captain aboard (R. 14); no logs were being kept on any of the boats (R. 60); and no navigation lights were displayed (R. 68).

The duties of the decedent as a "watch-fireman" were in essence those of a watchman or caretaker. It was his duty to protect the four boats to which he was assigned; to maintain fires; to keep steam in the boilers; to clean the bilges; and in general to watch the boats (R. 18, R. 19). He worked an eight-hour tour (R. 10, R. 12); he slept ashore (R. 60); checked in and out of his job at the office on the dock (R. 60); had locker and cafeteria facilities available ashore (R. 60, R. 73); and was not permanently assigned to any of these boats (R. 13).

At about 4:00 P.M. on December 25, 1949 the decedent, who had left his home in East Rutherford, New Jersey at about 2:30 P.M. (R. 9), called the crew dispatcher, the witness Corcoran, and advised him that he would probably be late for his assigned tour of duty which was to begin at 5 P.M. (R. 10). Corcoran advised the decedent that there were no other men available and that if he did not report, the tour of duty to which the decedent had been assigned would be short (R. 10). He advised the decedent to continue on his way to work (R. 10), and, pending his arrival, Corcoran assigned another watch-firemen, the witness Barker, to check the four boats to which decedent would be assigned (R. 10). At approximately 4 P.M., Mr. Barker, in accordance with instructions received from Mr. Corcoran, went aboard the four boats to which decedent would be assigned, pumped up the boilers with water, threw coal on the fires and pumped the bilges (R. 35). Barker estimated that he had built the fires up to a point which would keep them going for an hour and a half to two hours (R. 36).

Barker completed this task at about 5:00 P.M. and as he was returning to the office he met the decedent walking down the dock and they reported together to the office some-

time between 5:00 and 5:30 P.M. (R. 36 and 37). The decedent after signing up for duty told Barker that he was going to get his work clothes out of his locker (R. 37). He then walked down the dock to check his boats (R. 11). He returned to the crew dispatcher's office at about 7 or 7:15 P.M. still in his street clothes and reported to the dispatcher that he had completed re-checking his boats and that he was then going to change his clothes and go to work (R. 11). He then left the crew dispatcher's office walking towards the shore in the direction in which the "Altoona" and the three other boats to which he was assigned were berthed (R. 12). That was the last time that anyone saw the decedent alive.

On January 31, 1950 his body was found floating in the water off Pier F clad only in his socks and underwear and clutching a flashlight in one hand (R. 28, 29). The decedent's shoes and clothes were found on board the tug "Altoona" together with his lunch which was in an unopened paper bag (R. 30, 31). There is not a shred of evidence as to how, why or where the decedent fell into the water.

The cause was tried before Judge David N. Edelstein in the United States District Court for the Southern District of New York. At the conclusion of all the evidence the respondent's motion for a directed verdict was granted on the grounds that the petitioner had failed to prove that any negligence by the respondent had contributed in whole or in part to decedent's death. Judgment was entered in favor of the respondent. The United States Circuit Court of Appeals for the Second Circuit affirmed the judgment. The cause is before this Court on a writ of certiorari.

Summary of Argument

A. The direction of a verdict by the District Court and its affirmance by the Court of Appeals for the Second Circuit does not conflict with the decision of the Court of Appeals for the Fourth Circuit in *Sadler* v. *Pennsylvania R. Co.*, 159 F. 2d 784 (4 Cir. 1947) and does not deviate from any principle of law established by this Court in *Lavendar* v. *Kurn*, 327, U.S. 645. Neither court below held that proximate cause could not be established by circumstantial evidence. The direction of a verdict in favor of the respondent and its affirmance was based upon the principle that there were no probative facts which could form an evidentiary basis for a conclusion that any negligence by the respondent contributed in whole or in part to the decedent's accidental death; and that in the absence of such probative facts the petitioner had failed to sustain the burden of proof required of her under the *Jones Act*, 46 U.S.C. 688 et seq.

The petitioner argues that the testimony with respect to insufficient ill mination in the place where the decedent was working; the testimony with respect to insufficient help; and the testimony with respect to the presence of ice on the four boats to which the decedent had been assigned presented an evidentiary basis which would support the conclusion that the decedent's death was contributed to in whole or in part by the negligence of the respondent. However, there is not a shred of evidence in the record as to how, where or why the decedent met his accidental death and since the petitioner does not claim that these conditions existed at all points where the decedent would normally be performing his work (the record clearly establishes this) there is no way of knowing how or where the accident

occurred and hence a conclusion that it was proximately caused by some negligence on the part of the respondent is completely unjustified.

The petitioner attempts to substitute a theory or a hypothesis as to how the accident occurred in place of evidentiary facts from which a hypothesis could reasonably be inferred. The petitioner's hypothesis is that while changing his clothes preparatory to going to work the decedent heard a loud hissing noise on the out-board tug indicating excessive pressure in the boiler of that tug and necessitating prompt action by the decedent thus causing him to rush across the 4 tugs in his underwear and socks. The petitioner argues that the decedent fell while hurrying back from the out board tug.

There is no evidence that any such noise as would be emitted by escaping steam and which could have been heard for one half of a mile, was ever heard by anyone on the night in question. The petitioner's theory still leaves unanswered the questions of where and how the decedent fell into the water.

The cases cited by the petitioner in her brief are clearly distinguishable on their facts from the case at bar in that in each of those cases the "where", "how" and "why" of the accident or death could reasonably be inferred by some direct or circumstantial evidence. In the case at bar there is a complete absence of any probative facts, established by direct or circumstantial evidence, which would permit a conclusion that the decedent's death was casually related to any negligence on the part of the respondent.

B. The question of the applicability of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq., which was pleaded as an affirmative defense by

the respondent was never passed upon by the Court below. The nature of the decedent's duties clearly establish that he was not a member of the crew of any tug since he was not on board any of the 4 tugs primarily to aid in navigation; had no permanent connection with any of the 4 tugs to which he was assigned on the night in question; and the tugs had been temporarily removed from navigation. Under these facts it is respectfully submitted that the petitioner's sole and exclusive remedy is that provided by the Longshoremen's and Harbor Workers' Compensation Act.

ARGUMENT

POINT I

The decision of the Court of Appeals in the case at Bar is not in conflict with any decision of the Court of Appeals for the Fourth Circuit and does not deviate from any principles enunciated by this Court. In this action there is a complete lack of probative facts which would support a conclusion that any negligence by the respondent contributed in whole or in part to the accidental death of the decedent.

A writ of certiorari was granted in this action on a petition which alleged that the decision of the Court below was in conflict with a decision of the Court of Appeals for the Fourth Circuit rendered in *Sadler* v. *Pennsylvania R. Co.*, 159 F. 2d 784 (4 Cir. 1947); and that the decision of the Court below erroneously deviated from the principles of law established by this Court in the case of *Lavender* v. *Kurn*, 327 U.S. 645. An additional question concerning the propriety of the trial court's ruling in refusing to admit evi-

dence concerning the hazards of crossing from one tug to another and "other circumstantial evidence" has been presented in the petitioner's brief on the merits.

It is respectfully submitted that this additional question is not properly before the Court since it was not presented in the petition for the writ of certiorari. Cf. *Irvine* v. *California*, 347 U.S. 128, 129. In addition the petitioner never made a specific offer of proof with respect to this excluded evidence as required by Rule 43 (c) of the Federal Rules of Civil Procedure.

An analysis of the evidence in the case at bar clearly shows that the questions presented by the petitioner do not exist. *Sadler* v. *Pennsylvania R. Co.*, 159 F. 2d 784 (4 Cir. 1947), and *Lavender* v. *Kurn*, 327 U.S. 645, are clearly distinguishable on their own peculiar facts from the case at bar. The Court of Appeals in affirming judgment in the instant case did not hold that proximate cause could not be proved by circumstantial evidence and did not deviate from any principle of law enunciated by this Court.

The Court of Appeals, in the case at bar, held that there was a complete absence of any probative facts which would permit a reasonable inference that any negligence by the respondent contributed, in whole or in part, to the accidental death of the decedent. This Court explicitly stated in Lavender v. Kurn, 327 U.S. 645, 653, that in the absence of such probative facts the direction of a verdict is proper.

The case at bar is comparable to *Johnson* v. *Palmer*, 129 F. Supp. 202 (E.D.N.Y. 1953), affirmed 220 F. 2d 279 (2 Cir. 1955) cert. denied 349 U.S. 954; *Moore* v. *Chesapeake & O. R. Co.*, 340 U.S. 573; *Reynolds* v. *Atlantic Coast Line R. Co.*, 336 U.S. 207; and *Trust Co. of Chicago* v. *Erie R. Co.*, 165 F. 2d 806 (7 Cir. 1948) cert. denied 334 U.S. 845.

The plaintiff's cause of action under the Jones Act (46 U.S.C. 688 et seq.) is ~~founded upon~~ negligence. The plaintiff has the burden of proving that some negligence on the part of the defendant contributed, in whole or in part, to the accidental death of the plaintiff's intestate (45 U.S.C. § 51). An employer under this Act is not an insurer of the safety of its employees. *Tennant* v. *Peoria & Pekin Railroad Co.*, 321 U.S. 29, *Tiller* v. *Atlantic Coast Line R.R. Co.*, 318 U.S. 54. In directing a verdict in favor of the respondent the District Court stated that there was "some evidence of negligence" but not a shred of evidence which would causally relate such negligence to the accidental death of the decedent (R. 56). In affirming the direction of a verdict the Court of Appeals stated that the evidence of such alleged negligence was slight and perhaps at most only doubtfully sufficient to present a jury question as to the defendant's breach of duty but in addition stated that there was no showing whatsoever that the alleged negligent conditions were causally related to the accident (R. 83).

In attempting to establish that some negligence by the respondent contributed, in whole or in part, to the accidental death of the decedent the petitioner alleges that the respondent was negligent in assigning the decedent to watch four tugs instead of two tugs; and that the defendant was negligent in not providing sufficient light at the place where the decedent was performing his duties (Petitioner's Brief, p. 10).

There is also some reference in the petitioner's brief to an allegation that there was ice on board the four tugs to which the decedent had been assigned on the night of December 25, 1949.

Even assuming *ad arguendo* that these conditions existed, there is not a shred of evidence to show how any of these

alleged negligent acts are casually related to the accidental death of the decedent. There is no evidence of any kind, either direct or circumstantial, upon which a reasonable inference could be based, even if such facts be assumed, that insufficient illumination, ice on the tugs or an insufficient working force contributed in whole or in part to decedent's accidental death. The record is a complete blank as to how, why or where the decedent fell into the water. This void in the evidence prevents the formation of an evidentiary basis which would permit any kind of an inference that these facts, assuming they existed, contributed in whole or in part to decedent's death. *Johnson v. Palmer*, 129 F. Supp. 202, (E.D.N.Y. 1953) affirmed 220 F. 2d 279 (2 Cir. 1955) cert. denied 349 U.S. 954.

In the *Johnson* case, *supra*, the plaintiff's decedent was employed as a floatman on one of defendent's tugs which had been assigned to move 2 floats which were then moored to bridges on the East River. The decedent's duties consisted of releasing certain lines which secured the floats to the dock. He was last seen walking forward towards the bow of one of the floats presumably to cross over a bridge and release the lines on the second float. The captain and mate who were performing the maneuver heard a vocal signal indicating that the lines had been released but they were not certain as to whether or not the signal had been given by the decedent. In response to this signal the floats were backed away from the bridge.

Some two hours later, after the maneuver had been completed, the decedent's body was found floating in the water in the vicinity of the bridge to which the line on the second float had been secured. There was testimony that the defendant's tug captain had violated the custom and practice of the New York harbor in moving the floats. The Trial

Court directed a verdict in favor of the respondent on the basis of a previous decision of the Court of Appeals in the same case (*Johnson* v. *New York NH & H R. Co.*, 194 F. 2d 194 (2 Cir, 1952) revd. on other grounds 344 U.S. 48) which held that the absence of any evidence as to how or why the decedent had fallen over board represented a complete absence of probative facts which would support a conclusion that the respondent's negligence was casually related to the decedent's accidental death.

Similarly, in the case at bar there is no evidence of any kind as to how or why the decedent fell into the water and there is no evidence of any kind as to where the decedent fell into the water.

The petitioner attempts to distinguish *Johnson* v. *Palmer*, 129 F. Supp. 202 (E.D.N.Y. 1953) affirmed 220 F. 2d 279 (2 Cir. 1955) cert. den. 349 U.S. 954, by stating that the conditions alleged in the case at bar were "continuing ones which existed at all times when the circumstances indicate the deceased went overboard," (Petitioner's Brief, p. 20). But, as pointed out in the opinion of the Court below, the petitioner does not claim that the tugs or pier were completely covered with ice or were entirely shrouded in darkness (R. 84). Not knowing how or where the accident occurred it is impossible to conclude that it was proximately caused by these defaults even if it be assumed that these defaults had been clearly established.

With respect to the lighting conditions existing at the time it is conceded that the entire pier and at least portions of the boats were illuminated by the two sets of floodlights on the pier (R. 51, R. 55, R. 59, R. 62, R. 63, R. 65, R. 66, R. 67, R. 69, R. 74, R. 75, R. 78, R. 79). One of the witnesses, Stetson, testified that the pier was just like daylight and

that the lights lit up all the tugs at the dock (R. 66, 67); and another testified that there was sufficient illumination for him to observe ice on the bumping mats of the tugs berthed in the next tier (R. 78, 79).

The only witness who testified with respect to the existence of ice on the boats to which the decedent had been assigned was the witness Conlon (R. 56). Conlon had no duties in connection with the 4 tugs to which the decedent had been assigned (R. 79) and he admitted that the only place on which he observed any ice was the front bumping mats of the 4 tugs outside the bow (R. 79, 80). It is significant that none of the witnesses who were actually on board any of the 4 tugs to which the decedent was assigned testified to the presence of ice on the decks of the 4 tugs. Plaintiff's exhibit 12 in evidence (R. 82, 82a, p. 244 of Stenographer's Minutes) shows that the temperature recorded at Battery Place, N.Y.C. just across the river from Pier H, Jersey City, N. J. on the night of December 25, 1949 varied from 40 degrees at 5 P.M. to 42 degrees at midnight and increased from 43 degrees at 1 A.M., December 26, 1949 to 56 degrees midnight, December 26, 1949.

The allegation with respect to insufficient help in the case at bar is governed by the same principle as governed *Reynolds* v. *Atlantic Coast Line R. Co.*, 336 U.S. 207 in which case plaintiff's intestate, a railroad brakeman, had been killed when he fell between two cars of a moving train while crossing from one car to another. The defendant's negligence was alleged to consist of a failure on the part of the defendant to adequately clear its right of way of cane brush which obscured the decedent's vision, and a failure to supply sufficient competent help. It was alleged that as a result of both acts of negligence the decedent had to negotiate an additional crossing between moving cars so

as to station himself at a point from which he could be clearly seen by the engineer to whom he was to give a signal as part of a switching movement. There was no allegation as to what caused the decedent to fall between the cars. This court affirmed *per curiam* a judgment of non-suit entered on a demurrer to the complaint on the grounds that the facts alleged (permitting the right of way to become obscured and failing to provide sufficient help) did not show that the accident resulted proximately from the negligence of the defendent. The court pointed out that these acts of negligence had not caused the decedent to perform additional work more hazardous than that which he normally performed. Similarly in the case at bar particularly in the absence of any evidence as to how, why or where the decedent fell into the water there is no basis for a finding that even if there was insufficient help that it caused the decedent to perform work more hazardous than that which he ordinarily performed or was in any way causally related to his death.

The Supreme Court of Alabama in affirming the judgment of non-suit in the *Reynolds* case treated the allegation that the defendent had not furnished sufficient help as true but held that there was no showing of a casual connection between that fact and the death of decedent. *Reynolds* v. *Atlantic Coast Line R. Co.*, 251 Ala. 27, 36 So. 2d 102 (1948). It pointed out that the omission to supply adequate help without the intervention of a new or independent cause could not have produced the fall of the decedent. The same reasoning applies with equal force to the case at bar.

The allegation that there was insufficient help is neither supported by the evidence nor connected with the decedent's death. That the decedent's assignment to watch four boats was not unusual was attested to by the witness Corcoran

(R. 38). In fact, prior to decedent's arrival the witness Barker had been temporarily assigned to watch 7 boats (R. 35). The shortage of help at that time was clearly due to decedent's late arrival (R. 10).

Andrei, who "recalled" some talk of shortage of men, reported for work at 11:00 P.M. and went on board his boats at once (p. 38a). He testified that under certain conditions an extra watch-fireman would not be assigned to specific tugs immediately but would remain in the crew dispatcher's shack pending a definite assignment later in the evening (p. 16A). Thus, Andrei's recollection of a "shortage of men" is explained by the fact that an extra man was not kept in the dispatcher's office.

In asserting that the respondent was negligent in failing to provide sufficient help and sufficient illumination and then arguing that these alleged acts of negligence are causally related to the decedent's death, the petitioner in effect attempts to substitute a theory or a hypothesis in place of and instead of probative facts.

The petitioner's theory or hypothesis is that sometime between 7:00 P.M. and 11:00 P.M. while the petitioner was in his underwear and socks an emergency arose on the outboard tug, the "Williamsport" which required immediate attention. It is suggested that the emergency was created by an excessive amount of steam in the boiler on the "Williamsport" and the decedent hurried across the tugs to turn on the injector which would pump water into the boiler and lower the pressure. According to the petitioner it was while the decedent was hurrying back from the outboard tug that he fell and met his death by drowning. This theory has its genesis in the testimony that when Barker checked the "Williamsport" at 5:00 P.M. he had closed the

injector (R. 36) and when Andrei went aboard the "Williamsport" the injector was open although the boiler was not taking any water since it was full (R. 42). According to Andrei the injector had been open for about hours or since approximately 9:00 P.M. (R. 48).

The injector is operated manually, and is used to pump water into the boiler and to lower the pressure (R. 40). How long the injector is allowed to remain on depends upon the water supply; if there is plenty of water, it is left on for only a short time but if the water supply is low, it is sometimes left on for a period of an hour or two hours (R. 41).

The boiler is equipped with a safety valve to release excess steam pressure (R. 33, 42). When the steam pressure exceeds a certain maximum the safety valve "blows off" (R. 33) emitting a loud hissing noise which may be heard for one-half of a mile (R. 42, 52).

The most significant flaw in the plaintiff's theory is that there is not a shred of evidence or testimony that anyone heard a loud hissing noise such as would have occurred if the safety valve had suddenly "blown" as suggested by the petitioner. The fact that the boiler was equipped with a safety valve which would automatically lower the maximum pressure negates the speculation that even if the boiler had built up excessive steam, it would have required the decedent to rush across the four tugs in his underwear and his stocking feet.

The witness Barker testified that after he had attended the fires and boilers on the decedent's boats at 5:00 P.M., they would have lasted for an hour and a half to two hours (R. 36). The decedent finished rechecking his boats at approximately 7:00 P.M. which is the time about which, according to Barker's estimate, they would require atten-

tion. Is it not just as probable and as reasonable that the decedent opened the injector on the "Williamsport" at this time before he reported back to Corcoran's office. It is respectfully submitted, in view of Andrei's testimony that the boiler on the "Williamsport" was full of water when he first noticed the injector open at 11:15 P.M., that it would be impossible for Andrei to state how long the injector had in fact been on unless he knew how much water had been in the boiler before the injector had been turned on. Concededly he did not know this fact since he first boarded the "Williamsport" at 11:15 P.M.

It is respectfully submitted that the hypothesis advanced by the petitioner is completely without any evidentiary basis and is no more probable than any other theory or hypothesis which could be advanced leading to a conclusion that the plaintiff fell overboard. The balance of probability between the hypothesis advanced by the petitioner and any other hypothesis or guess as to what happened is, viewing it most favorably to the petitioner equal. In such a state of circumstances, the petitioner has failed to sustain the burden of proof that some negligence on the part of the respondent in whole or in part, contributed to the decedent's accidental death.

As stated by Mr. Justice Minton (then Judge Minton) in *Trust Co. of Chicago* v. *Erie R. Co.*, 165 F. 2d 806, 809 (7 Cir. 1948), cert. denied 334 U.S. 845:

> "* * * It is all speculation as to the manner in which the decedent met his death. That is the trouble with the plaintiff's case. One can speculate on how the accident happened, but where is the evidence as to how it did happen? Where is the evidence from which a reasonable inference could be drawn as to how it happened? Many reasonable hypotheses as to how the accident happened may be conjured up, but it is not reasonable hypotheses we are interested in, but evidence from which reasonable inferences may be drawn."

In that case the decedent railroad employee, working in defendant's yard, was last seen alive by his fellow employees crossing certain tracks. Shortly thereafter his mangled body, presumably run over by a train, was found 700 feet from the point where he had been last seen. No one saw the accident and there was no evidence as to how the decedent met his death except that he had been run over by one of defendant's trains, presumably by one which had been observed standing on the track a few minutes earlier. There was no evidence establishing at what point along the track the decedent was first struck, whether he was dragged any distance or whether the engine or all the cars or only a part of the cars passed over him. There was a directed verdict in favor of the defendant which was affirmed on appeal since there was a total failure of proof as to how the accident happened.

In the case at bar, viewing the evidence in the light most favorable to the plaintiff, there is a similar failure of proof as to how or at what point the petitioner fell into the water, and thus there is a complete failure of proof with respect to causally connecting any alleged negligence on the part of the respondent with his death. In the cases relied upon by the petitioner this gap or chasm in the evidence was not present and hence these cases are clearly inapplicable. In every case cited by the petitioner there was some evidence, either direct or circumstantial, as to how, where and when the plaintiff had been injured or killed.

Thus, in *Sadler v. Pennsylvania R. Co.*, 159 F. 2d 784 (4 Cir. 1947) while no one actually saw the decedent fall into the water he was found treading water between the two barges at a point near where a broken guard rail was found. At that point, from which it could reasonably be inferred that the decedent had fallen, there was admittedly no illumination.

In the case at bar there is no evidence, either direct or circumstantial, as to how the decedent fell or from where he fell. To decide that he fell as a result of any negligence on the part of the defendant, in the absence of any evidence as to how he fell, or at what point he fell, would be sheer speculation. Speculation or conjecture can not take the place of proof. *Galloway* v. *United States*, 319 U.S. 372.

In *Lavender* v. *Kurn*, 327 U.S. 645 the place of accident was indisputedly established as having occurred immediately adjacent to the defendant's railroad tracks at a time when one of defendant's trains was moving thereon. The nature of the plaintiff's injury or wound permitted an inference that it had been caused by a mail hook which was allowed to swing loosely from the outside of the train. The "when" and "where" of the accident were established by direct evidence. The circumstantial evidence permitted an answer to the question of "how" by the use of reasonable inferences based on the evidentiary facts. In the case at bar it is impossible by any reasonable inference based on the evidentiary facts to ascertain how, why or where the decedent met his accidental death.

In *Casey* v. *American Export Lines*, 173 F. 2d 324 (2nd Cir. 1949) the evidence that the decedent was burned to death and that the defendant had failed to maintain proper fire watches permitted the reasonable inference that if the defendant had maintained proper fire watches, the decedent could have been rescued. There is direct causal relationship between the negligent act in this instance and the death of the decedent which is not present in the case at bar.

In *McDonough* v. *Buckeye S.S. Co.*, 103 F. Supp. 473 (N.D. Ohio 1951) the decedent, in an intoxicated condition, was left lying on a dock by an employee of the defendant into whose duty he had been entrusted. Two weeks later

decedent's body was found floating in the water after an immediate search had failed to disclose anything other than decedent's hat at the place on the dock where he had been left. Under these circumstances nothing could be more reasonable than the inference that the decedent, abandoned in a drunken and helpless condition, fell from the dock into the water as a result of his having been negligently abandoned by the employee into whose care he had been entrusted.

In *Johnson* v. *Griffiths S.S. Co.*, 150 F. 2d 124 (9 Cir. 1945) the decedent fell into an open hatch of a "blacked out" ship. The place of the accident was established by the finding of the decedent at the bottom of the open hatch. In the case at bar there is no evidence as to where the plaintiff fell into the water.

In *Pearce* v. *Lehigh Valley R. Co.*, 157 F. 2d 252 (3 Cir. 1948) the place of injury was established by the direct testimony of the plaintiff as a narrow catwalk in an allegedly poorly illuminated portion of defendant's roundhouse. In *Brabazon* v. *Belships Co.*, 202 F. 2d 904 (3 Cir. 1953) there was also direct evidence as to how and where the plaintiff had sustained his injuries and there was direct evidence that at the point where the accident occurred there was insufficient illumination. In *Armit* v. *Loveland*, 115 F. 2d 308 (3 Cir. 1940) there was also direct evidence as to the place where the accident occurred and how the accident occurred. In *Boston & Maine R.R. Co.* v. *Cabana*, 148 F. 2d 150 (1 Circuit 1945) cert. den. 325 U.S. 873, the manner in which the accident occurred and the place where the accident occurred was established by direct evidence, the plaintiff having been struck by a backing locomotive while employed in the defendant's insufficiently illuminated roundhouse.

In the case at bar there is no evidence as to how, where or why the accident occurred and, paraphrasing *Lavender v. Kurn*, 327 U.S. 645, 653, there is a complete absence of probative facts which would support a conclusion that any negligence on the part of the defendant contributed in whole or in part to the decedent's accidental death. Hence there is no evidentiary basis which would justify a finding in favor of the petitioner on the issues in this record.

POINT II

Since the decedent was not a member of the crew of any vessel on the night in question but was in fact a harbor worker the petitioner's sole and exclusive remedy is that which is provided by the Longshoremen's and Harbor Workers' Compensation Act 33 U.S.C.A. 901 Et. Seq.

The Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C., 901 et seq.) provides a compulsory system of compensation, irrespective of the employer's fault, for disability or death resulting from injury to employees occurring upon the navigable waters of the United States, if the employer has employees engaged in maritime employment in whole or in part upon the navigable waters of the United States. The respondent operating tug boats, carfloats, etc. in navigable waters is an employer within the meaning of § 2, subdiv. (4) of the said Harbor Workers' Compensation Act and has complied with the provisions of said Act (R. 80 and 81). The respondent pleaded said Act on an affirmative defense but the applicability of the Act to the case at bar was never passed on.

The petitioner attempts to bring this action under the Jones Act, 46 U.S.C. § 688 et seq., by alleging that dece-

dent was "employed as a seaman on board the tug boat "Altoona", which was moored to the dock of the defendant" (paragraph Eighth of the complaint). The petitioner then argues that the decedent having been a seaman on said tug boat, was "a member of the crew" and thus within the exception of the Longshoremen's and Harbor Workers' Compensation Act, which concededly does not apply to "a master or member of a crew of any vessel" (33 U.S.C. § 902 (3)).

As stated in *Caramba* v. *Cape Cod S.S. Co.*, 123 F. 2d 991, 994 (1 Cir. 1971):

> "If the plaintiff is a 'seaman' under the Jones Act and a 'member of a crew' under the Longshoremen's Act, then he is free to sue under the Jones Act. If he is not a 'member of a crew' under the Longshoremen's Act, he must proceed under that Act and he is not entitled to maintain this suit under the Jones Act."

Thus, the petitioner, to bring herself within the provisions of the Jones Act must establish that the decedent was a "seaman" under the Jones Act and a "member of a crew" under the Longshoremen's Act. The duties which are being performed at the time of injury control, even though they may not be the duties ordinarily performed by the employee. Thus, in *Pennsylvania R. Co.* v. *O'Rourke*, 344 U.S. 334, 340, this Court stated as follows:

> "An injured worker's particular activity at the time of injury determines, of course, whether he was injured in the course of his employment within Section 902(2), and whether he was a member of the crew of the vessel within the exceptions of Sections 902(3) and 903(a)(1)." [Section numbers have reference to the Longshoremen's & Harbor Workers' Compensation Act.]

In the *O'Rourke* case, *supra*, p. 22, the claimant was a railroad freight brakeman whose duties only incidentally included work on defendant's floats moored in navigable waters. He was injured while releasing a hand brake on a freight car which was on a float in navigable waters. His exclusive remedy was held to be that provided by the Longshoremen's and Harbor Workers' Compensation Act, *supra* p. 21.

To the same effect is *Long Island Rail Road Co.* v. *Lowe*, 145 F. 2d 516, (2 Cir. 1944) where Mr. Justice Swan, speaking for the Court of Appeals for the Second Circuit, stated on p. 518:

> "An employee's duties on the day of the accident are the critical facts which should determine his status as a member of the tug's crew."

In the *Lowe* case, *supra*, the plaintiff's intestate ordinarily performed duties similar to a harbor worker on behalf of the Long Island Rail Road. On the day he met his death through drowning, however, he had been assigned to a tug in navigation as a first deckhand or mate. A claim was presented against his employer for death benefits under the Longshoremen's and Harbor Workers' Compensation Act. An award made by the Deputy Commissioner was set aside by the judgment of the District Court which was affirmed by the Court of Appeals. The sole issue presented was whether or not the decedent was a member of a crew of any vessel within the meaning of the statutory exceptions set forth in the Longshoremen's and Harbor Workers' Act. In determining this factor the Court stated that the only duties which were to be considered were the duties he was performing on the day he met his death and that these duties clearly established that he was a member of the crew.

In the case at bar, on the night that the decedent met his death, he was performing the duties of a watch-fireman assigned to watch four tugs as a watchman and to maintain steam in three of these tugs by keeping the fires alive (R. 24 and 25) and under the circumstances cannot be considered as having been a member of the crew of any one of these tugs.

In *Reyes* v. *A. H. Bull S.S. Co.*, 80 F. Supp. 223 (S.D.N.Y. 1948), Judge Liebell, in holding that the plaintiff was not a member of the crew but was in fact covered by the Longshoremen's and Harbor Workers' Act, listed certain factors as determinative. The plaintiff signed no ship's log; was not directed in his work by any of the ship's officers; worked under a foreman or boss ashore; had regular hours or a regular shift; received an hourly salary with extra payment for overtime; lived ashore; slept ashore; and got all his meals ashore, except lunch. He was a member of a maintenance gang getting the vessel in shape to sail; cleaning the ship and doing odd jobs. Judge Liebell held that even though the plaintiff held a seaman's certificate at the time of the accident, since he was not a "member of the crew", he could not maintain an action under the Jones Act.

These factors are equally applicable to the case at bar. There is no proof that the decedent held a seaman's certificate. He worked an eight-hour shift (R. 10 & 12); he slept ashore (R. 60); had cafeteria facilities ashore (R. 75); he performed no duties with respect to navigation on any of the tugs to which he was assigned as a watch-fireman and in fact these tugs had been temporarily removed from navigation (R. 15 & 16). He had locker facilities ashore (R. 60); his time records were kept ashore (R. 60); he was the only employee assigned to watch these four tugs (R. 14); and no log was kept on any of these tugs (R. 60).

This Court has enunciated the factors which are to be considered in determining whether or not an employee is or is not a "member of the crew", in *South Chicago Coal and Dock Co. v. Bassett*, 309 U.S. 251. The decedent employee had drowned after falling from a vessel of his employer in navigable waters of the United States. The vessel was a 310-ton lighter and the decedent was considered by the captain of the lighter to have been a deckhand. The Court of Appeals had reversed a District Court judgment which had enjoined an award under the Longshoremen's and Harbor Workers' Compensation Act, holding that since the decedent was not on board primarily to aid in navigation he could not have been a member of the crew. This Court affirmed pointing out that the decedent had performed such tasks as throwing the ship's rope in shoving off or making fast. He facilitated the flow of coal from his ship to vessels which it refueled. He occasionally did some cleaning of the boat. He did not work while the boat was en route from the dock to the vessel to be fueled.

The Court of Appeals thought that it was significant that his only duty relating to navigation was the incidental task of throwing the ship's line and that his primary duty was to free the coal if it stuck in the hopper while being discharged into the vessel being fueled. He was paid an hourly wage; signed no "articles"; slept at home; and his employment was somewhat akin to temporary employment although he had worked three weeks and it might have been possible that he may have been retained for years to come.

In affirming the decision of the Court of Appeals which held that the Deputy Commissioner had properly made an award under the Compensation Act, this Court held that the phrase "member of a crew" included what is commonly

known as the "ship's company"; and that it was meant to comprehend those who are naturally and primarily on board aiding in navigation.

Three primary requisites are involved:

(1) A "member of a crew" is one of those employees who are naturally and primarily on board to aid in navigation. *South Chicago Coal Co.* v. *Bassett*, 309 U.S. 251.

(2) One obviously can not be a "member of the crew" if the ship is not in navigation. *South Chicago Coal Co.* v. *Bassett*, 309 U.S. 251.

(3) There must also be a more or less permanent connection between the ship and the worker. *Caramba* v. *Cape Cod S.S. Co.*, 123 F. 2d 991 (1 Cir. 1941).

In the case at bar, none of these three factors are present: The decedent was on board the four tugs primarily as a watchman; the tugs were not in navigation; and the decedent had no permanent connection with any of the tugs. He was in fact an extra-watch-fireman who was ordinarily assigned to watch different tugs various nights of the week (R. 13).

The fact that there exists the possibility that at some time in the future the plaintiff might have been assigned to a tug in actual operation or that he had been so assigned in the past on occasion, does not entitle the petitioner to maintain an action under the Jones Act. *Desper* v. *Starved Rock Ferry Co.*, 342 U.S. 187.

In the *Desper* case the decedent had been employed as an operator of one of a fleet of motorboats carrying sightseers on a river during the summer months only. After the termination of his employment he had helped to lay the boats

up for the winter. He was re-employed in March and while helping to paint, clean and waterproof the boats, preparing them for navigation, he was injured. At the time of his injury none of the boats were afloat; none had a captain or crew and the work being done was the kind that would customarily be done exclusively by shore-base personnel. Decedent had been a seaman in the past and expected in the future to return to his employment as an operator of the boats and hence a seaman. At the time of his injury, however, the Court held he was not a seaman and hence could not maintain an action under the Jones Act. The fact that he had been a seaman in the past and expected to be a seaman in the future did not entitle him to maintain an action under the Jones Act.

In *Gonzales* v. *Riverside and Fort Lee Ferry Co.*, 43 F. Supp. 366 (S.D.N.Y. 1947), Judge Rifkind held that the libellant could not maintain an action under the Jones Act against his employer when his injury occurred while he was engaged in work customarily done by harbor workers despite the fact that he frequently held a position as a member of a crew. Judge Rifkind held that the duties of the libellant at the time of his injuries controlled.

The libellant in this action had been employed as a fireman on one or more of the defendant's ferry boats. He had frequently been employed also in such positions as demolishing ferry house; making appliances in workshop; radiating ferries by loading coal; cleaning ashes and boilers; maintaining steam in stand-by ferries; greasing ferry fenders and slip piles; and tending terminal grounds. He was injured while attempting to grease fenders of ferries owned by the defendant when he was caught between the piles of the pier and ferry boat.

Judge Rifkind pointed out that libellant was not employed under "articles"; he slept ashore and ate ashore; he received hourly wages. In addition, he had no duties directly connected with navigation of the ferries except on several occasions he had been a fireman or an oiler. He was under the direction of shore supervisor and not ship's officers. Judge Rifkind stated (43 F. Supp. 366) at p. 367:

> "These facts compel the conclusion that the libellant was not a member of the crew of the Tenafly."

It was held that the fact that the libellant had some time been a member of the crew was immaterial.

In the case at bar decedent was assigned as a watch-fireman to four tugs and under the facts, he can not be considered to have been a member of the crew of any of these tugs.

CONCLUSION

Since there are no probative facts which would support a conclusion that any negligence by the respondent contributed in whole or in part to the accidental death of the decedent and the opinion of the Court below does not conflict with any decision of the Court of Appeals for the Fourth Circuit or deviate from any principles enunciated by this Court and since the petitioner's sole remedy is that provided for by the Longshoremen's and Harbor Workers' Compensation Act the judgment of the Court below should be affirmed.

Respectfully submitted,

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On the Brief

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